UNITED STATES CUSTOMS COURT REPORTS

VOLUME 80

CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

January—June 1978

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UNITED STATES CUSTOMS COURT

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CASES REPORTED IN FEDERAL SUPPLEMENT

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Customs

(C.D. 4728)

A. N. DERINGER, INC. *v.* UNITED STATES

Articles of asbestos

Importations of a mixture of asbestos, calcined magnesite and epsom salts claimed to be asbestos, not manufactured, or asbestos crudes or fibers under item 518.11 TSUS or articles in part of asbestos and hydraulic cement under item 518.44 TSUS *held* properly classified as articles not specially provided for of asbestos under item 518.51 TSUS.

The claim for asbestos, not manufactured, is based on the principle that an *eo nomine* designation without terms of limitation or contrary legislative intent, judicial decision or administrative practice includes all forms of the article. See *Nootka Packing Co.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935); *Crosse & Blackwell Co.* v. *United States*, 36 CCPA 33, C.A.D. 393 (1948); *T. M. Duche & Sons, Inc.* v. *United States*, 44 CCPA 60, C.A.D. 638 (1957).

Item 518.11 *supra* does not provide for asbestos without limitation. It includes five forms of asbestos. In addition, it has been judicially determined that asbestos mixed with paper pulp is not asbestos unmanufactured. *R. F. Lang* v. *United States*. 22 Treas. Dec. 901, Abs. 28666, T.D. 32560 (1912).

By virtue of classification under item 518.51 *supra* there is a presumption that the imported product is in chief value of asbestos by virtue of general headnote 9(f)(i). The classification does not carry with it the presumption that the imported merchandise is asbestos not manufactured or asbestos fibers.

Asbestos in grade 7 under the Quebec Asbestos Mining Association standards, which the legislative history establishes are widely recognized in the United States, is considered asbestos shorts or asbestos sand and refuse. It is not considered asbestos crudes.

Classification under the provision for asbestos sand and refuse is excluded since the imported merchandise contains more than the 15 percent by weight of foreign material prescribed by the statute.

The imported merchandise does not fall within the statutory terms as established by the record and legislative history.

The combination of the components results in an oxysulfate cement which is not included within the meaning of hydraulic cement.

Court No. 72-2-00281

Port of Ogdensburg

[Judgment for defendant.]

(Decided January 12, 1978)

Barnes, Richardson & Colburn (*Joseph Schwartz* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

FORD, Judge: Plaintiff instituted this action in an effort to obtain more favorable tariff treatment of certain importations of asbestos mixed with caustic calcined magnesite (magnesium oxide), referred to as part A, and epsom salts (magnesium sulfate), referred to as part B. The merchandise was classified under item 518.51, Tariff Schedules of the United States, as modified by T.D. 68–9, as articles not specially provided for of asbestos and consequently was assessed with duty at the rate of 6% ad valorem or 5% ad valorem, depending upon the date of entry.

The importer contends the merchandise is entitled to entry free of duty under item 518.11, Tariff Schedules of the United States, which provides for various forms of asbestos. Alternatively, it is contended if not free of duty it is dutiable at 0.15¢ per pound or 0.1¢ per pound, depending upon the date of entry, under item 518.44, Tariff Schedules of the United States, as modified by T.D. 68–9, as other articles in part of asbestos and hydraulic cement.

The pertinent statutory provisions provide as follows:

Subpart F. – Asbestos and Asbestos Products

518.11	Asbestos, not manufactured, asbestos crudes, fibers, and stucco, and asbestos sand and refuse containing not more than 15 percent by weight of foreign matter	Free
* * * * * * *		
	Articles in part of asbestos and hydraulic cement:	
* * * * * * *		
518.44	Other	0.15¢ or 0.1¢ per lb. [depending upon date of entry]
* * * * * * *		

518.51	Articles not specially provided for, of asbestos	6% or 5% ad val. [depending upon date of entry]

The record consists of the testimony of three witnesses called on behalf of plaintiff and four on behalf of defendant. In addition, plaintiff introduced 13 exhibits and defendant offered two exhibits.

The asbestos involved in the imported merchandise was produced by Carey-Canadian Mines, Ltd., hereinafter referred to as Carey-Canadian, by mining and crushing, after which the fibers were separated by a process called aspiration and then screened according to size. Asbestos is sold and priced according to the length of the fibers. The longest fibers are either crude No. 1 or crude No. 2 and are the most expensive. The shorter fibers which are graded under the specifications of the Quebec Asbestos Mining Association range from grades 3 through 7. The asbestos used in the imported product was grade 7 which Carey-Canadian designated as 7M90. This grade is known as "shorts" rather than crudes and might also be considered as asbestos sand and refuse. The calcined magnesite and the magnesium sulfate were purchased by Carey-Canadian for use with the imported merchandise.

Universal Fire-Bar, Inc., the United States purchaser, set the specifications for the merchandise involved. This company also designs and builds machinery such as automatic water dispensers, foam generators, pumps, and pole guns with external atomization nozzles which allow the product to be sprayed on a steel surface for use as fireproofing. The purpose is to prevent the steel from losing its structural strength resulting from a fire. The imported product has no use in its dry state. It must be combined with a foaming agent and water before spraying. The imported product is not used where it would be exposed to the elements such as rain.

Defendant's exhibit A, a copy of ASTM publication C 219–66, entitled *Standard Definitions of Terms Relating to Hydraulic Cement*, defines the term hydraulic cement as "a cement that is capable of setting and hardening under water due to interaction of water and the constituents of the cement." Witnesses Sztuke, Sporn, Seward, Pollock, Libel and Redeker all agreed with the foregoing definition.

The term "set" in the definition was generally agreed by the witnesses to mean the ability of the materials to assume a shape, while the term "hardness" means the ability to resist change or distortion under pressure or force. The test for setting requires the use of a needle such as a "Westvaco." This is applied to the surface of the material and when the needle no longer leaves an impression, the material is considered set. Hardening, on the other hand, is tested

in a compression machine which determines the amount of force necessary to break or fracture the material. Hydraulic cement must have both of these capabilities.

Plaintiff's exhibit 5, a laboratory report, indicates the samples were submerged in water for 68 hours (tests 2 and 4) and the product in test 2 remained spongy and plastic. Test 4 of said exhibit indicates a certain amount of granulation when the surface of the sample is rubbed. Notwithstanding the pliability, witness Sztuke considered the imported merchandise to be a borderline hydraulic cement since it "sets under water."

Plaintiff's witness Libel described various tests he conducted on portland cement and on samples of combinations of caustic calcined magnesite and epsom salts and he concluded that both were hydraulic cement.

Tests performed by Mr. Sporn, branch chief at the New York Customs Laboratory, and defendant's witness Redeker, western regional manager for Industrial Magnesia Corp., on samples of the imported mechandise or the same mixture indicated the samples that were allowed to set and harden in the air became hard and rocklike, while those that were immersed in water immediately after forming a patty did not harden, were easily abraded or remained in a puttylike consistency. In their opinion the imported merchandise was not a hydraulic cement. Mr. Redeker testified that he was a technical adviser for the committee of the ASTM which put out the specifications for the ingredients used in oxysulfate and oxychloride cements. Defendant's exhibit B, which is ASTM designation C 376–58 and entitled *Standard Definitions of Terms Relating to Magnesium Oxychloride and Magnesium Oxysulfate Cements*, was identified by the witness. The imported merchandise is an oxysulfate cement. According to Mr. Redeker, magnesium oxychloride cement and oxysulfate cement are used for fireproofing and other uses with binders of asbestos and other material. They are not water resistant.

Hydraulic cement, according to the witness, is a cement which when mixed with water will set and harden under water. Neither oxysulfate nor oxychloride cements are hydraulic cements because they will not suitably set or harden under water. Caustic calcined magnesite, plus epsom salts and water, would not result in a hydraulic cement.

The witness further testified that other cements which are not hydraulic are gypsum cements, plaster of paris and Keene's cement. The most common hydraulic cement according to witnesses Redeker and Pollock is portland cement, others being portland-pozzolan cement, slag cement, portland blast-furnace slag cement and oil well cement. Magnesium oxysulfate cement is not water resistant and cannot be used in asbestos cement, pipe or products intended to

carry water in cesspools, in the ground, or where water or excessive moisture would be a factor.

The merchandise involved, imported in 63-pound bags, consists of 50 pounds of chrysotile asbestos fibers, grade 7M90 (79% by weight), 7 pounds of part A, caustic calcined magnesite (11% by weight) and 6 pounds of part B, epsom salts (9% by weight). The addition of parts A and B were as binding agents. The mixture of the three components was accomplished during the shipment where the natural movement of the bags caused the various components to mix. The use of the imported mixture, after being combined with a water and foaming agent, is to spray it on internal steel to prevent its losing structural strength as the result of a fire.

Plaintiff's contention, notwithstanding the mixture with parts A and B, is that the imported merchandise is asbestos unmanufactured. This position is based upon the principle that an *eo nomine* designation without limitation or contrary legislative intent, judicial decision, or administrative practice, and without proof of commercial designation, includes all forms of the article. See *Nootka Packing Co.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935); *Crosse & Blackwell Co.* v. *United States*, 36 CCPA 33, C.A.D. 393 (1948); *T. M. Duche & Sons, Inc.* v. *United States*, 44 CCPA 60, C.A.D. 638 (1957).

The court is well aware of this principle. However, plaintiff's reliance thereon is misplaced. Initially, item 518.11 *supra* does not provide for asbestos without limitation. Said item provides for five forms of asbestos. In addition, the case of *R. F. Lang* v. *United States*, 22 Treas. Dec. 901, Abs. 28666, T.D. 32560 (1912) held that asbestos mixed with paper pulp is not "asbestos, unmanufactured," as provided for in paragraph 501, Tariff Act of 1909, but is a nonenumerated manufactured article under paragraph 480 of said act.

The classification under item 518.51 *supra* carries with it the presumption that it is in chief value of asbestos by virtue of general headnote 9(f)(i). Said headnote defines "of" as used in the Tariff Schedules of the United States to mean wholly or in chief value of the named material. Said classification does not, however, carry with it the presumption that the imported merchandise is asbestos not manufactured or asbestos fibers as contended by plaintiff. On the contrary, the presumption resulting from the classification is to the effect that the imported merchandise is not asbestos unmanufactured or asbestos fibers.

The balance of the claim for free entry under item 518.11 *supra*, as set forth in the complaint filed herein, are asbestos crudes, asbestos fibers, or asbestos shorts, which the record establishes is within the same category as asbestos sand and refuse. Since there has been no attempt by either party to establish a commercial designation, the common meaning of the terms are considered controlling.

It is interesting to note the following information contained in the Summaries of Trade and Tariff Information (1969), Schedule 5, Volume 1, page 160:

> Commercial asbestos is divided into: (1) asbestos crudes, (2) milled asbestos fibers, and (3) asbestos sand and refuse. "Crudes" is a trade term applied to fibers of spinning grade, measuring three-eights of an inch or longer, that are hand cobbed (cleaned of waste material with a hammer) without being passed through a mill for fiberizing. * * *
>
> Unmanufactured asbestos is marketed by groups rather than as a single product. Groups of asbestos are principally governed by the length of the fiber. Each length has different characteristics and thus has different applications. Longer fibers command higher prices, and prices are progressively lower for shorter grades, although openness, tensile strength, absorption, and other qualities of the fibers are also taken into consideration.
>
> There is no standard uniform group classification of asbestos in commerce, and the various producing companies and countries adopt their own groupings. The specifications of the Quebec Asbestos Mining Association, whose grades are determined by mechanical sieving (using the Quebec Testing Machine), are widely accepted in the United States. According to the Quebec Asbestos Mining Association, the crudes and spinning fibers comprise group 1, 2, and 3. Group 4 is designated as shingle fiber; group 5, paper fiber; group 6, waste, stucco or plaster; and group 7, refuse or shorts.

Additionally, the Tariff Classification Study (1960), Schedule 5, part 1, at page 30 refers to the limitations imposed on asbestos sand and refuse as follows:

> In item 518.11 an effort has been made to clarify without change of scope the existing language of paragraph 1616. The qualification "containing not more than 15 percent by weight of foreign matter" is intended to apply only to asbestos sand and refuse and the rewritten provision makes this clear.

Since the record establishes the asbestos is grade 7M90 it is apparent from the foregoing that it could not fall within the categories of asbestos crudes or asbestos fibers.

The last claim under item 518.11 *supra* is also clearly eliminated due to the limitation of "15 percent by weight of foreign matter." As indicated *supra* the involved merchandise contains 20 percent by weight of matter other than asbestos.

The alternative claim of plaintiff under item 518.44 *supra* as an article in part of asbestos and hydraulic cement has commanded most of the record testimony and exhibits. The Tariff Classification Study *supra*, page 30, contains the following information regarding plaintiff's alternative claim:

> The language "in part of asbestos and hydraulic cement" reduces to simple terms the actual meaning of the language "in part of

asbestos, if containing hydraulic cement or hydraulic cement and other material". The "in part of" concept in this provision has been retained as it is not likely to produce anomalous classification results. Any product which contains a commercially significant quantity of asbestos and hydraulic cement is appropriately classified within this provision. In practice, goods in this classification generally do not have less than 10 percent by weight of asbestos.

The Summaries of Trade and Tariff Information *supra*, page 173, contains the following information on articles of asbestos and hydraulic cement:

> Portland cement and asbestos fibers are used in combination in a great variety of building materials to produce products having weather and fire resistant properties. In a wet state, this material can be molded into almost any desired shape. When dry, it is rigid, strong, and durable. The ratio of asbestos fibers to cement in such products varies from 15 to 25 percent, depending on the length and class of the fibers used and the product being made. Chrysotile asbestos is the principal fiber used in making asbestos cement products. Crocidolite is sometimes used, but in small amounts because of its low strength; amosite fiber is rarely, if ever, used for such purposes. A product which contains a commercially significant quantity of "asbestos and hydraulic cement" is "in part" of such materials and unless more specifically provided for elsewhere in the TSUS is covered by this summary.
>
> Asbestos cement products are particularly useful in industrial buildings and private housing. Principal products made from asbestos cement are shingles, roofing, siding, flat and corrugated sheets, wallboard, and pipes. Asbestos cement pipes are manufactured for use in the construction of sewage and water systems.

Based upon the foregoing and the record as made, the issue with respect to this claim is whether parts A and B are hydraulic cement. The record establishes that the combination of parts A and B results in a magnesium oxysulfate cement. This combination, plaintiff contends, based upon tests performed, results in a hydraulic cement.

The definition of hydraulic cement, as set forth in ASTM designation C 219–66, defendant's exhibit A, reads as follows:

> Hydraulic Cement—A cement that is capable of setting and hardening under water due to interaction of water and the constituents of the cement.

It is noted that this ASTM publication defines "Terms Relating to Hydraulic Cement." The single page (page 218) received in evidence lists five different types of hydraulic cement, i.e., natural cement, portland cement, portland blast-furnace slag cement, portland-pozzolan cement, and slag cement. Nowhere in the publication, defendant's exhibit A, is any reference made to magnesium oxysulfate cement. Defendant's exhibit B, ASTM designation C 376–58, relates to magnesium oxysulfate cement and magnesium oxychloride cement.

Hydraulic cement, as such, is provided for in item 511.11, Tariff Schedules of the United States. The Tariff Classification Study makes the following observation in schedule 5, part 1, page 19:

> The existing practice with respect to the tariff classification of concrete mixes under paragraph 205(d) apparently is confined to concrete mixes in which the cementing material is hydraulic cement. It would not seem to apply, for example, to a so-called bituminous concrete mix consisting essentially of asphalt or tar and a suitable aggregate. Also appearing in commerce are concrete products which have been made of mixes consisting of mineral aggregates cemented together with resins. Therefore, the final draft provides two rate provisions for concrete mixes, the first of which (item 511.21) covers the hydraulic cement concrete mixes referred to above and the second of which (item 511.25) covers other concrete mixes.

Similarly, caustic calcined magnesite, as such, is encompassed by item 522.64, Tariff Schedules of the United States, and the Summaries of Trade and Tariff Information (1968), Schedule 5, Volume 2, page 149, makes the following statement under the heading: "Description and uses":

> Caustic calcined magnesite is used chiefly in the manufacture of oxychloride and oxysulfate cements.

It is readily apparent the congressional intent in enacting item 518.44 *supra* was not to permit all asbestos combined with cement to be classified thereunder. Congress specifically provided for hydraulic cement. The record and legislative history establish to the satisfaction of the court that magnesium oxysulfate cement, when combined with asbestos, is not subject to classification under said provision.

Accordingly, the claims are overruled and the action is dismissed. Judgment will be entered accordingly.

(C.D. 4729)

PHOSTOXIN SALES, INC. *v.* UNITED STATES

Chemicals

AMMONIUM CARBAMATE—METALLIC SALT—INORGANIC COMPOUND

A pesticide, called Phostoxin, composed of aluminum phosphide and oxide, ammonium carbamate, and paraffin, and exported from West Germany and classified in liquidation upon entry at Los Angeles, Calif. under TSUS item 432.00/425.52 as modified by T.D. 68–9 as a mixture not specially provided for at the rate of 1.5 cents per pound plus 7.5 *per centum ad valorem* on the basis of its ammonium carbamate component, *Held*, dutiable under item 432.00 as a mixture not specially provided for at the rate of 5 *per*

centum ad valorem on the basis of the ammonium carbamate component, if imported separately, being classified under the provision for ammonium carbonate and bicarbonate in TSUS item 417.24 (1) in view of legislative history of the compound ammonium carbamate being known only to Congress as a component of commercial ammonium carbonate, (2) expert testimony that ammonium carbamate cannot be made without the presence of ammonium carbonate and that it is always, simultaneously, a mixture of the two compounds, and (3) the likelihood of reliance by the framers of the TSUS upon the Brussels Nomenclature, among others, who expressly associate the compound ammonium carbamate with the metallic carbonates, ammonium carbonate and bicarbonate, as inorganic chemical compounds.

Court No. 76-1-00058

Port of Los Angeles

[Judgment for plaintiff.]

(Decided January 16, 1978)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock (*Alan L. Langus* and *Herbert P. Larsen*, trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise in this action is a toxic pesticide in pellet form, called Phostoxin, which is composed of a mixture of aluminum phosphide, traces of aluminum oxide, ammonium carbamate, and hard paraffin. The pesticide was exported from West Germany in February, 1975, and classified in liquidation upon entry at Los Angeles, California, under TSUS item 432.00 as modified by T.D. 68-9 as a mixture not specially provided for, and, in accordance with item 432.00,[1] assessed for duty under TSUS item 425.52 as modified by T.D. 68-9 at the rate of 1.5 cents per pound plus 7.5 *per centum ad valorem* on the basis of the ammonium carbamate being treated as other nitrogenous compounds if imported separately.

The importer claims that the pesticide is properly classifiable under TSUS item 423.96 as modified by T.D. 68-9 as a mixture of two or more inorganic compounds, other, at the duty rate of 5 *per centum ad valorem*, or in the alternative, if properly classified under item 432.00, is dutiable under TSUS item 417.44 as modified by T.D. 68-9 at the same rate on the basis of the ammonium carbamate being treated as other ammonium compounds if imported separately. The importer further claims that in the event the court determines that the ammonium carbamate component of the pesticide is an *organic* chemical compound, then the pesticide is dutiable under TSUS item 425.22 as modified by T.D. 68-9 at the duty rate of 5 *per centum*

[1] Item 432.00 classification provides for duty assessment at the rate of 5% ad val. but not less than the highest rate applicable to any component material.

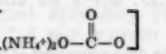
ad valorem on the basis of the ammonium carbamate being treated as an acyclic amide if imported separately.

In the pleadings before the court it is admitted that the aluminum phosphide and oxide components of the pesticide are *inorganic* chemical compounds, and that the cation constituent of the ammonium carbamate component is an ammonium ion. In issue under the pleadings is the allegation that the ammonium carbamate component is an *inorganic* chemical compound. However, at the trial it was conceded by plaintiff's counsel that the paraffin component of the pesticide is an *organic* chemical compound. Consequently, irrespective of the court's determination as to the chemical nature of the ammonium carbamate component, it is clear at the outset that the imported pesticide is not composed entirely of *inorganic* chemical compounds, and as such, was properly classified under item 432.00 as a mixture not specially provided for.

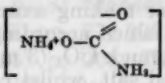
The question for determination by the court then is one relating to rate of duty [rather than to classification], the ascertainment of which turns upon the chemical nature of the disputed compound ammonium carbamate. Is ammonium carbamate an *inorganic* chemical compound as primarily claimed, or an *organic* chemical compound as classified? For tariff purposes *inorganic* compounds (including salts) are compounds not containing carbon, except carbides and such carbon-containing compounds as inorganic cyanides and cyanates, metallic carbonates, and oxides of carbon which are inorganic in nature, while *organic* compounds are compounds containing carbon except such carbon-containing compounds as carbides, inorganic cyanides and cyanates, metallic carbonates, and oxides of carbon. TSUS, Schedule 4, Part 2 headnotes 2 and 3.

The court is of the opinion that ammonium carbamate is an *inorganic* chemical compound which Congress intended should be classified under the provision for the metallic carbonates, ammonium carbonate and bicarbonate, in TSUS item 417.24 which, at the time of exportation of the subject merchandise, carried a modified specific duty at the rate of 0.25 cent per pound.

Dr. W. Conard Fernelius, Distinguished Professor Emeritus at the University of South Florida, who, among other things, has taught chemistry at American universities for over 35 years and whose familiarity with the compound ammonium carbamate dates back to 1926 and antedates that of any of the other four chemists who testified in the case, explained the difference between the carbonate and carbamate compounds. He testified that ammonium carbonate



contains the carbonate ion, CO_3 and the ammonjum ions to balance the charge. He said that the ammonium carbamate



has a negative ion of two oxygens, one carbon, one nitrogen, and two hydrogens, and that as this is a single negative charge, only one ammonium ion is required to balance the charge. Dr. Fernelius testified that in terms of environment around the carbon, ammonium carbonate differs from ammonium carbamate by the former having three oxygens whereas the latter has two oxygens and a nitrogen. But more significantly, the witness stated that ammonium carbamate cannot be made without the presence of ammonium carbonate. He said it is always, simultaneously, a mixture of the two compounds (R. 170).

In 1921 the tariff commission mentioned the compound ammonium carbamate in the context of its report to the Senate Committee on Finance on the compound *ammonium carbonate*, then provided for in paragraph 7 of the House passed tariff bill H.R. 7456.[2] Under the heading AMMONIUM CARBONATE the tariff commission report stated:

> *Description* . . . .—Commercial ammonium carbonate, a mixture of ammonium carbonate and ammonium carbamate containing about 31 per cent of ammonia (NH_3), is a white crystalline salt smelling strongly of ammonia, volatile when heated, and sometimes known as sal volatile. . . .
>
> *Production.*—It is made by heating a mixture of ammonium sulphate and chalk (calcium carbonate). The vapors of ammonia, carbon dioxide, and water, on cooling, condense to form the solid mixture of ammonium carbonate and ammonium carbamate. The crude product is usually purified by sublimation. *The domestic output is unknown.* [Emphasis added.]

Contemporary lexicons defined the term *ammonium carbonate* as applying to "The commercial article called *sal volatile* . . . a mixture of hydrogen-ammonium carbonate and ammonium carbamate" [*The Century Dictionary*, 1913 edition, Vol. 1, p. 177]; and "The commercial product sold under this name [which] consists of a mixture of ammonium bicarbonate $NH_4 \cdot HCO_3$ with ammonium carbamate $NH_2 \cdot CO \cdot ONH_4$, and contains about 31 p.c. of ammonia and 56 p.c. of carbon dioxide. . . ." [*A Dictionary of Applied Chemistry*, Thorpe, revised edition 1918, Vol. 1, p. 151]. That the commercial product was considered the preferred form of ammonium carbonate is indi-

[2] H.R. 7456 was subsequently enacted into law as the Tariff Act of 1922. Paragraph 7 of that act, which was amended in the Senate, contained a provision for *ammonium carbonate and bicarbonate*. The same provision was reenacted as paragraph 7 of the 1930 Tariff Act, the predecessor of item 417.24 which carries the same language.

cated in an even earlier lexicon. Under the heading COMMERCIAL AMMONIUM CARBONATE Thorpe stated:

> The usual process for making ammonium carbonate does not appear quite rational, since according to the conditions of the process there is only enough CO_2 (3 molecules CO_2 to 4 molecules NH_3) to form a neutral salt, whilst commercial ammonium carbonate corresponds to 1½ times as much CO_2. . . . Hence a large quantity of ammonia must go away in the uncombined state unless carbon dioxide in excess is passed into the condensing chambers. At Kunheim's works (near Berlin) the gaseous mixture from the distillation of gas-liquor is directly brought together with CO_2 in lead chambers, and thus the commercial salt is produced. . . . [*A Dictionary of Applied Chemistry*, Thorpe, 1898, Vol. 1, p. 101.]

Thus, given an awareness on the part of Congress of the presence of ammonium carbamate only as an ingredient of commercial ammonium carbonate, Congress, in providing for chemical compounds, must have had in mind chemical compounds commercially salable as such. *United States* v. *Betz*, 30 CCPA 16, 22, C.A.D. 208 (1942). Consequently, it is reasonable to conclude that Congress considered that the compound ammonium carbamate would be covered in the provision for the ammonium carbonates since, as the uncontroverted testimony of the witness Fernelius reveals, the disputed compound does not exist independently of the carbonate compounds, i.e., if imported at all it would come in in the form of commercial ammonium carbonate.

Having concluded that Congress intended ammonium carbamate to be included in any classification scheme for ammonium carbonates under the 1930 and prior tariff acts, it follows that when Congress subsequently designated ammonium carbonates as *inorganic* chemical compounds under the Tariff Schedules it intended the same designation to apply to ammonium carbamate. That this is the case is reflected in the fact that Congress did not intend any significant changes beyond a "reorganization of existing provisions" to be made in the classification of *inorganic* chemical compounds under the Tariff Schedules. *Tariff Classification Study*, Schedule 4, p. 56. Any other view on the part of the Congress concerning the nature of chemical compounds would have compelled that body to make specific provision for the long known ammonium carbamate compound consistent with its general intention to make specific provision in the Tariff Schedules for known commercial commodities. *Tariff Classification Study, Submitting Report*, p. 16.

Moreover, reference sources which are said to have "exerted the greatest influence on the arrangement of the proposed revised schedules", namely, the Standard Industrial Classification Manual and the Brussels Nomenclature, place ammonium compounds in general and

ammonium carbamate in particular in the categories of inorganic chemical compounds and carbonates, respectively. *Tariff Classification Study, Submitting Report*, p. 8; *Standard Industrial Classification Manual*, Industry No. 2819, pp. 77, 299; *Explanatory Notes to the Brussels Nomenclature* (1955) p. 201, Heading 28.42. Thus, under subchapter V entitled Metallic Salts . . . of Inorganic Acids of the Brussels Nomenclature, whose division of chemical compounds is not unlike our own, Heading 28.42 provides for: CARBONATES . . . INCLUDING COMMERCIAL AMMONIUM CARBONATE CONTAINING AMMONIUM CARBAMATE.

In the light of the legislative history of the tariff provision for ammonium carbonate and bicarbonate and the testimony of the witness Fernelius, among others, the conclusion is inescapable that ammonium carbamate is an *inorganic* chemical compound classifiable under the provision for ammonium carbonates in item 417.24. And since the modified specific duty provided for in item 417.24 is less than the *ad valorem* rate of duty provided for in item 432.00, the latter duty rate must prevail, and the court so holds. For the reasons stated the imported pesticide, Phostoxin, is dutiable under the provision for ammonium carbonate and bicarbonate in item 417.24 at the rate of 5 *per centum ad valorem* in accordance with item 432.00.

Judgment will be entered herein accordingly.

(C.D. 4730)

BAR & BARBEQUE PRODUCTS, INC. *v.* UNITED STATES

Motion for Summary Judgment
and
Cross-Motion To Dismiss

Court No. 75-4-00845

Port of Los Angeles

[Judgment for plaintiff.]

(Decided January 16, 1978)

Glad, Tuttle & White (*T. Randolph Ferguson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney H. Kuflik*, trial attorney), for the defendant.

BOE, Judge: Before the court for determination are plaintiff's motion for summary judgment and defendant's cross-motion to dismiss on the jurisdictional ground that the plaintiff was not the proper party to file the protest.[1]

[1] Plaintiff's initial motion sought judgment on the pleadings under rule 4.9. However, both parties have presented to the court for its consideration matters outside of the pleadings in the nature of affidavits. Accordingly, pursuant to rule 4.9, plaintiff's original motion shall be treated as one for summary judgment under rule 8.2.

The controversy underlying this action concerns the proper classification of battery-operated slot machines. The articles were classified under item 737.40, TSUS, as modified by Presidential Proclamation 3822, T.D. 68–9, with duty at the rate of 17.5% ad valorem. Plaintiff claims that the merchandise is properly classifiable under item 734.20, TSUS, as modified, with a 5.5% ad valorem rate of duty. In its answer to the plaintiff's complaint, the defendant admits that the merchandise had been improperly classified, and consents to the entry of judgment sustaining the plaintiff's claimed classification under item 734.20, TSUS, as modified. Subsequently and in response to plaintiff's initial motion for judgment on the pleadings, the defendant filed its cross-motion to dismiss. Thus, the sole issue presented herein is whether the plaintiff has standing under 19 U.S.C. § 1514(b)(1) to file a protest and is the proper party to prosecute this action.

At the time of the entry of the merchandise involved in this case, James G. Wiley Co. (Wiley), a customhouse broker, was listed on the consumption entry as the importer of record and the nominal consignee. The entry was made for the account of the plaintiff and, on the entry form, the plaintiff was declared to be the actual owner of the merchandise. Following liquidation, the plaintiff, not Wiley, filed the administrative protest objecting to the classification made by the Customs Service. The defendant acknowledges that the plaintiff is the actual owner and ultimate consignee of the merchandise in question. It does not allege in its motion to dismiss that it has been misled in any manner by the filing of the instant protest. The defendant's sole contention is that as the owner of imported merchandise the plaintiff is not among those persons authorized to file the protest under 19 U.S.C. §1514(b)(1) which provides in part:

> * * * protests may be filed by the importer, consignee, or any authorized agent of the person paying any charge or exaction * * *.

The defendant in urging its motion to dismiss ignores recent decisions which clearly demonstrate that the plaintiff has standing to file the instant protest. *See Pasco Terminals, Inc.* v. *United States*, 65 CCPA—, C.A.D. 1201 (decided December 15, 1977); *United States* v. *Wedemann & Godknecht, Inc. a/c Atwater Throwing Co.*, 62 CCPA 86, C.A.D. 1151, 515 F. 2d 1145 (1975); *Mohawk Recreation Products, Inc.* v. *United States*, 77 Cust. Ct. 180, C.R.D. 76–13 (1976); *Hancock Gross Mfg., Inc.* v. *United States*, 75 Cust. Ct. 188, C.R.D. 75–6, 400 F. Supp. 813 (1975); *Baylis Brothers Co., etc.* v. *United States*, 75 Cust.

Ct. 89, C.D. 4611, 400 F. Supp. 940 (1975). The rationale in these cases indicate that one in the position of the instant plaintiff has the standing to file an administrative protest as the "agent of the person paying [the] * * * charge or exaction," that is, the importer of record or nominal consignee.[2]

The statement contained in *United States* v. *Wedemann & Godknecht, Inc., supra*, pertaining to the relationship of the appellee therein (a customhouse broker) to an associate employed to enter merchandise and pay duty thereon at the outports (Allen Forwarding Co.), indeed, more than serves as judicial approbation of the plaintiff's act in filing the protest in the instant action:

> * * * While there is no evidence of specific appointment of Wedemann & Godknecht, Inc., to act as agent of Allen Forwarding Co. in filing protests, it would have been a work of supererogation to have made such an appointment in view of the relationship of these customs brokers to each other and to the business of Farbenfabriken Bayer and its domestic customers. Those relationships were such as to reduce to an absurdity the strange statement in the Government's brief that "Wedemann & Godknecht Inc. was a stranger to the entry transaction * * *." On the contrary, the facts demonstrate that Wedemann & Godknecht, Inc., was in the driver's seat throughout, selecting out-port brokers to represent it and its client, employing lawyers to file protests as necessary, and generally looking after the customs business of FFB. Allen Forwarding Co. did not have to appoint it to file protests as its agent because Wedemann & Godknecht, Inc., was making the decisions and when it filed the protests on the Philadelphia importations it must have done so as the agent of "the person paying such charge." Although it did so without specific request or appointment, we think the "ratification" by Allen Forwarding Co. cleared up that question, both confirming the agency relationship within the meaning of section 514 and adopting the action taken as its own. [62 CCPA at 91.][3]

It would appear unnecessary, however, to base this decision solely upon the tenuous and circuitous reasoning that the plaintiff acted as Wiley's agent in filing the protest. The plaintiff is the acknowledged owner of the imported merchandise. As owner, the plaintiff hired Wiley to facilitate the entry process but, nevertheless, retained ultimate control over the filing of protests to contest the amount of the duties assessed since it (plaintiff) was the party which ultimately paid the duty by reimbursing Wiley.[4] We are unaware of any decision of this court or our appellate court which has barred the owner of

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[2] Paragraph nine of the affidavit of William R. Fielding, vice-president of James G. Wiley Co., states that the plaintiff "has acted as agent for James G. Wiley Co. in filing protests or having had filed protests on its behalf pursuant to Section 514 of the Tariff Act of 1930, as amended."

[3] The affidavit of William R. Fielding, vice-president of the James G. Wiley Co., clearly states that Wiley subsequently ratified the action of the plaintiff in filing this protest.

[4] *See* Fielding Affidavit, ¶7.

imported merchandise from filing a protest. Indeed, no reasonable interpretation of section 1514(b)(1) would lead to the conclusion that the Congress intended to prohibit a *bona fide* owner of imported property from personally protecting or enforcing his proprietary interests in a court of the United States, merely because he may have elected to appoint an agent in the form of a customs broker to assist in the administrative requirements incident to the importation of the merchandise. Particularly is this true, where, as it appears in the instant action, the government, from the time of the entry of the merchandise in question, has been aware of the true identity of the owner and ultimate consignee thereof. No failure to disclose, covert or otherwise, has caused the government to sustain any unwarranted administrative burden.

Although customs law by reason of its specialized nature at times may require a "singular" construction and interpretation, the basic principles of the law of agency, contracts and property, upon which the fundamental rights of an individual are so often predicated, can neither be overlooked, lightly dismissed nor declared inapplicable. Thus, in view of the fact that the plaintiff fully reimbursed Wiley for all the duties paid, this court is of the opinion that the plaintiff may be considered to be "the person paying any charge or exaction" within the meaning of 19 U.S.C. 1514(b)(1).

In a decision relating to the interpretation of section 1514(b)(1) and the persons having standing thereunder, the United States Court of Appeals, Second Circuit, in the case of *Patchogue-Plymouth Mills Corporation* v. *Durning*, 101 F. 2d 41 (1939), and appropriately referred to by Judge Miller in his concurring opinion in the *Wedemann* case, points out the absurdity in failing to recognize the applicability of the law of agency relating to the principal and his agent. In so doing, the court stated:

> * * * To be sure the statute speaks of the agent of the person paying such charge but that includes the principal for otherwise substance would be subordinated to mere language and the absurd result would be reached that an agent would be given power to file a protest for a principal who, not being empowered to file one himself, could have no authority to authorize an agent to do it. Besides that, this plaintiff is a corporation which had to act by its agents. [101 F. 2d at 43.]

The plaintiff as owner of the merchandise in question not having been precluded by section 1514(b)(1) from filing the protest and from instituting the within action, the motion of the plaintiff for summary judgment, accordingly, is hereby granted and the motion of the defendant to dismiss for lack of jurisdiction is hereby denied.

Let judgment be entered accordingly.

(CD 4731)

A. N. DERINGER, INC. *v.* UNITED STATES

Biscuits, cookies and candy—Admission refused

Court No. 73-8-02142

Port of Ogdensburg

[Dismissed.]

(Decided January 25, 1978)

Barnes, Richardson & Colburn (*Joseph Schwartz* and *Edward F. Christopher* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Mark K. Neville, Jr., Laura D. Millman*, trial attorneys), for the defendant.

FORD, Judge: Plaintiff in this action seeks to recover duties paid on importations of certain biscuits, cookies, and candy which were refused admission as being in violation of various sections of the Federal Food, Drug and Cosmetic Act, and which were exported to the country of origin.

This case was submitted on the following stipulation of fact:

1. The merchandise the subject of this case consists of biscuits and cookies.

2. The merchandise involved in this case was, at the time of entry thereof into the commerce of this country was sought, in violation of the Federal Food, Drug and Cosmetic Act and regulations enacted pursuant to the Fair Packaging and Labeling Act in the following respects because of the manner in which it was labeled: by not having the packaging bear the identity of the commodity by means of a common or usual name of the produce (*e.g.*, "cookies," "biscuits") [FPLA, Sec. 1.8b(f)]; by not placing the net weight declaration separate from other printed information, and parallel to the base on which the package rests while displayed and only in the lower 30 percent of said label panel, and in type at least ⅛ inch high [FPLA, Sec. 1.8b(f)]; by not having all required mandatory language in the foreign language as well as in the English language [FPLA, Sec 1.8b(i)(2)] and [FPLA, Sec. 1.9(c)(q)]; by not including the name of the Canadian Province in the business declaration [FPLA, Sec. 1.8a (d)]; by not specifying each ingredient more particularly than by a collective name; and by not removing the words; "strawberry tarts" from those packages in which said words appear.

3. Because of the foregoing violations, plaintiff was sent on August 29, 1972, three Notices of Detention and Hearing on form FD–777, copies of which are attached hereto as Joint Exhibit A.

4. Plaintiff, despite the Notices of Detention and Hearing sent because of the nonconforming labeling, failed to communicate

in any way with the Food and Drug Administration, although the Notices gave plaintiff the privilege of appearing for a hearing, and failed to relabel the merchandise even though it was implicit in the law and regulations that plaintiff had the right to relabel the merchandise and again seek entry thereof.

5. The merchandise involved in this case, if relabeled to correct the deficiencies noted in paragraph 1, would not have been in violation of the Federal Food, Drug and Cosmetic Act and regulations enacted pursuant to the Fair Packaging and Labeling Act.

6. The merchandise involved in this case, if so relabeled, would not have had to have been exported, and could have been released into the commerce of the United States.

7. The merchandise was the subject of three Notices of Refusal of Admission (Form FD–772), copies of which are attached as Joint Exhibit B, which were sent to plaintiff on September 8, 1972, only after plaintiff failed to communicate in any way with the Food and Drug Administration after dispatch of the Notices of Detention and Hearing.

8. The involved merchandise was exported on September 12, 1972.

9. The involved case is hereby submitted for decision upon this set of stipulated facts, with plaintiff requesting 60 days after approval of this stipulation within which to file a brief and defendant requesting 60 days after receipt of plaintiff's brief within which to file its brief.

Based upon the pleadings filed herein the court notes the entries involved were liquidated on September 29, 1972 and a protest filed on December 19, 1972. The court further notes that the merchandise was exported from the United States on September 12, 1972 (paragraph 8 of the stipulation) under customs supervision (paragraph 8 of the complaint and admitted in the answer), some 17 days prior to liquidation.

Liquidation under such circumstances, and particularly in view of Customs Regulation, section 12.6, as amended by T.D. 68–191, creates doubt as to the validity of the liquidation.

§ 12.6 Suspension of liquidation.

(a) The liquidation of each entry covering merchandise, the subject of § 12.1,* shall be suspended until it is determined whether admission of the merchandise into the United States is permitted under the law.

The foregoing regulation is couched in mandatory terms. The law is clear that regulations which are not unreasonable and are prescribed under authority of the law, when duly promulgated, have the same force and effect as if written in the statute and are binding upon the importer and government officials alike. *Maple Leaf Petroleum, Ltd.* v.

*Section 12.1 covers, among other things, food.

United States, 25 CCPA 5, T.D. 48976 (1937); *Thornley & Pitt a/c Earl Investment Corpn.* v. *United States*, 33 Cust. Ct. 136, C.D. 1645 (1954).

The purpose of Customs Regulation, section 12.6, is apparent on its face. Liquidation in customs is the finalization of the customs entry process. This act constitutes a settlement of duties due the United States and finalizes the liability of the importer. This action under section 514 of the Tariff Act of 1930, as amended, is final and conclusive upon all parties unless a protest is filed against a valid liquidation or action of customs. It is certainly reasonable for customs to suspend liquidation on items such as food, drugs, devices and cosmetics until it is determined if entry under the law is permitted. If not permitted, as in the case at bar, such liquidation would be a useless act since the merchandise if exported or destroyed pursuant to the statute and regulations would result in a refund of the duties deposited. 19 U.S.C. § 1558(a).

In view of the circumstances I am constrained to find the liquidation to be in violation of section 12.6 of the customs regulations and therefore void. *See A. N. Deringer, Inc.* v. *United States*, 80 Cust. Ct. 19, C.D. 4732. Accordingly, the protest is premature and therefore dismissed. Judgment will be entered accordingly.

(C.D. 4732)

A. N. DERINGER, INC *v.* UNITED STATES

Broth, seasoning base and yeast extract—Admission refused

Court No. 73-8-02143

Port of Ogdensburg

[Dismissed.]

(Decided January 25, 1978)

Barnes, Richardson & Colburn (*Joseph Schwartz* and *Edward F. Christopher* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Mark K. Neville, Jr.*, and *Laura D. Millman*, trial attorneys), for the defendant.

FORD, Judge: Plaintiff in this action seeks to recover duties paid on importations of certain broth, seasoning base and yeast extract which were refused admission as being in violation of the various sections of the Federal Food, Drug and Cosmetic Act, and which were exported to the country of origin.

This case was submitted on the following stipulation of fact:

1. The merchandise the subject of this case consists of broth and seasoning base and yeast extract.

2. The merchandise involved in this case was, at the time entry thereof into the commerce of this country was sought, in violation of the Federal Food, Drug and Cosmetic Act and regulations enacted pursuant to the Fair Packaging and Labeling Act in the following respects because of the manner in which it was labeled: by not having the accurate net weight of the product listed [Food, Drug and Cosmetic Act, section 403(e)(2)]; by not having the net weight declaration appear in type at least ⅛ inch high, separated above and below other printed information by at least the size of the declaration [FPLA, Sec. 1.8b(i)(2)]; by not including the Canadian Province of origin in the business address [FPLA, Sec. 1.8a(d)].

3. Because of the foregoing violations, plaintiff was sent on June 7, 1972, two Notices of Detention and Hearing on form FD–777, copies of which are attached hereto as Joint Exhibit A.

4. Plaintiff, as a result of the nonconforming labeling, was sent Notices of Detention and Hearing but failed to communicate in any way with the Food and Drug Administration, although the Notices gave plaintiff the privilege of appearing for a hearing, and failed to relabel the merchandise.

5. The merchandise involved in this case, if relabeled to correct the deficiencies noted in paragraph 1, would not have been in violation of the Federal Food, Drug and Cosmetic Act and regulations enacted pursuant to the Fair Packaging and Labeling Act.

6. The merchandise involved in this case, if so relabeled, would not have had to have been exported, and could have been released into the commerce of the United States.

7. The merchandise was the subject of two Notices of Refusal of Admission (Form FD–772), copies of which are attached as Joint Exhibit B, which were sent to plaintiff on June 27, 1972, only after plaintiff failed to communicate in any way with the Food and Drug Administration.

8. The involved merchandise was exported on June 27, 1972.

9. The involved case is hereby submitted for decision upon this set of stipulated facts, with plaintiff requesting 60 days after approval of this stipulation within which to file a brief and defendant requesting 60 days after receipt of plaintiff's brief within which to file its brief.

Based upon the pleadings filed herein the court notes the entry involved was liquidated on June 23, 1972. The liquidation was reviewed under section 520, Tariff Act of 1930, as amended, and denied on October 20, 1972. A protest was then filed on January 9, 1973 demanding reliquidation of the entry. The court further notes that the merchandise was exported from the United States under customs

supervision (paragraph 8 of the complaint and admitted in the answer) on June 27, 1972 (paragraph 8 of the stipulation).

Liquidation, particularly in view of Customs Regulation, section 12.6, as amended by T.D. 68–191, creates doubt as to the validity of the liquidation.

§ 12.6 Suspension of liquidation.

(a) The liquidation of each entry covering merchandise, the subject of § 12.1,* shall be suspended until it is determined whether admission of the merchandise into the United States is permitted under the law.

The foregoing regulation is couched in mandatory terms. The law is clear that regulations when reasonable and prescribed under authority of the law, when duly promulgated, have the same force and effect as if written in the statute and are binding upon the importer and government officials alike. *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937); *Thornley & Pitt a/c Earl Investment Corpn.* v. *United States*, 33 Cust. Ct. 136, C.D. 1645 (1954).

The purpose of Customs Regulation, section 12.6, is apparent on its face. Liquidation in customs is the finalization of the customs entry process. This act constitutes a settlement of duties due the United States and finalizes the liability of the importer. This action under section 514 of the Tariff Act of 1930, as amended, is final and conclusive upon all parties unless a protest is filed against a valid liquidation or action of customs. It is certainly reasonable for customs to suspend liquidation on items such as food, drugs, devices and cosmetics until it is determined if entry under the law is permitted. If not permitted, as in the case at bar, such liquidation would be a useless act since the merchandise if exported or destroyed pursuant to the statute and regulations would result in a refund of the duties deposited. 19 U.S.C. § 1558(a).

In view of the circumstances I am constrained to find the liquidation to be in violation of section 12.6 of the customs regulations and therefore void. The mere fact that customs was notified of an alleged clerical error, inadvertance, mistake of fact, or whatever, pursuant to section 520 *supra*, does not necessarily result in a timely protest being filed based upon the refusal of customs to "reliquidate" the entry. The record is barren of any evidence as to what plaintiff's contention was under the section 520 proceeding, nor does the record contain the reason assigned for the denial of said request. In any event, the protest and the pleadings filed refer to refusal to reliquidate the entry.

As is apparent from the foregoing, the liquidation, in violation of section 12.6 of the customs regulations, is void. *See A. N. Deringer*,

*Section 12.1 covers, among other things, food.

Inc. v. *United States*, 80 Cust. Ct. 17, C.D. 4731. Hence any action which seeks to reliquidate an entry, the liquidation of which is void *ab initio*, is one which requests an impossible act and is therefore a nullity.

I am therefore constrained to dismiss the action as being based upon a void act. Judgment will be entered accordingly.

(C.D. 4733)

CORNING GLASS WORKS *v.* UNITED STATES

Opinion on Defendant's Motion for Rehearing

Court No. 75-8-02008

Port of New York

[Motion denied.]

(Dated January 26, 1978)

Murray Sklaroff for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

NEWMAN, Judge: Defendant has moved, pursuant to rule 12.1, for an order granting a rehearing, and for vacatur of the decision and judgment entered in this action on October 4, 1977 (79 Cust. Ct. 72, C.D. 4716 (1977)). Plaintiff has filed an opposition to defendant's application.

For the reasons indicated herein, defendant's motion is denied.

I

This action concerns the proper tariff classification for certain "Rota" ampul inspection machines, which were assessed with duty in liquidation at the rate of 25 per centum ad valorem under the provision in item 710.90, TSUS, as modified by T.D. 68-9, for "Optical measuring or checking instruments and appliances not provided for elsewhere in subpart C, D, or F of this part [part 2, schedule 7], and parts thereof: * * * Other". Plaintiff claims, *inter alia*, that the Rotas are properly dutiable at the rate of 5 per centum ad valorem under the provision in item 678.50, TSUS, as modified by T.D. 68-9, for "Machines not specially provided for".

In C.D. 4716, I held the Government's classification under item 710.90 to be erroneous, since the Rota machines perform neither a measuring nor checking function. Inasmuch as such finding was dispositive of the propriety of defendant's classification under item 710.90

it was unnecessary to further determine whether or not the Rota machines are "optical instruments".

2

In support of its present motion, defendant advances the argument that "whether or not it [Rota machine] performs a measuring or checking function, it is specifically provided for as such in item 708.89, TSUS, as other optical appliances and instruments not provided for elsewhere in part 2 of schedule 7"; and that "in the absence of a more specific enumeration, item 708.89, TSUS, must provide for the Rota, unless it is held not to be an 'optical' appliance or instrument". Defendant further contends that plaintiff failed to rebut the presumption that the Rota machines are optical instruments, and therefore plaintiff's claim under item 678.50, TSUS, should not have been sustained.

In opposition to defendant's motion, plaintiff argues that it has negated the Government's classification under item 710.90 by showing that the Rota machines perform neither a measuring nor checking function; and consequently, even assuming the machines are optical instruments, they are not classifiable under item 710.90. Plaintiff further points up that an examination of the pleadings, post-trial briefs and the record shows that defendant made no alternative claim for classification under item 708.89 or other tariff provision; and that the court should not have to consider all possible classifications for the merchandise, "especially where such possibilities were *not* raised by a party". Finally, plaintiff contends that even if there is a presumption arising out of the classification of the Rotas under item 710.90 that they are optical instruments, defendant has not claimed another possible classification that could utilize such presumption.

3

At the outset, it should be observed that defendant concededly made no alternative claim prior to the decision in C.D. 4716 under item 708.89 or under any other provision for optical instruments in the tariff schedules. Nevertheless, I wish to stress that I am not precluded from now considering, on the merits, an alternative claim in the interest of justice. Indeed, a decision is not carved in stone, and in the interest of justice a court may, under an appropriate set of facts and circumstances, revise or change its decision in accordance with the court's rules respecting rehearings. Thus, for examples of cases in which the court has granted a rehearing to consider a new claim or other issue, see: *United States* v. *Shell Oil Co., Inc., et al.*, 44 CCPA 54, C.A.D. 637 (1957) (after the protest had been overruled without sustaining the collector's classification, the Customs Court

permitted the importer to amend its protest on rehearing to make a new claim, which was sustained); *The Firestone Tire & Rubber Company* v. *United States*, 72 Cust. Ct. 296, C.R.D. 74–3 (1974) (defendant was permitted to raise an appraisement issue for the first time on rehearing); *P. Beiersdorf & Co., Inc.* v. *United States*, 14 Cust. Ct. 151, C.D. 927 (1945) (on rehearing, defendant raised new issue under internal revenue code). And *cf. Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941); *United States* v. *Collin & Gissel (Ludwig Baer)*, 29 CCPA 96, 101, C.A.D. 176 (1941); *Border Brokerage Co., Inc.* v. *United States*, 64 Cust. Ct. 446, 448, C.D. 4017 (1970).

Fundamentally, of course, the granting or denial of a rehearing is within the sound discretion of the court. *Commonwealth Oil Refining Company, Inc.* v. *United States; United States* v. *Commonwealth Oil Refining Company, Inc.*, 60 CCPA 162, 166, C.A.D. 1105, 480 F. 2d 1352 (1973); *United States* v. *Shell Oil Co., Inc., supra; Thornley & Pitt et al.* v. *United States*, 19 CCPA 221, T.D. 45325 (1931).

4

Initially, I interpreted defendant's memorandum in support of its motion for rehearing as presenting an alternative claim under item 708.89, and hence *sua sponte* scheduled and heard oral argument. However, at the oral argument, defendant surprisingly disavowed item 708.89 as an alternative classification, and insisted upon reinstatement of its original classification under item 710.90 (Tr. oral arg. 2, 12–13, 16). Although expressly eschewing any alternative classification in support of its motion for rehearing, defendant in effect seeks to have this court *sua sponte* determine the merits of classifying the merchandise under item 708.89. In this connection, defendant cites *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

But in *New York Merchandise*, the Government *specifically asserted an alternative classification* (toys), arguing that if the original classification (toy figures of animate objects) were held to be incorrect, the imported articles should be held classifiable under the claimed alternative provision. Thus, the Court of Customs and Patent Appeals observed (58 CCPA at 58–59):

> * * * In this case, the original classification [toy figures of animate objects] required a finding that the subject articles were, *inter alia*, "toys". *When the government asserted the broader provision*, covering toys, in general, *as an alternative to the original classification*, it should have been permitted to rely on the presumption of correctness attaching to that subsidiary finding of the Collector. * * * [Emphasis added.]

Plainly, since here defendant did not assert, and in point of fact disavowed. any alternative classification, reliance upon *New York*

Merchandise is entirely misplaced. The presumption of correctness attaching to the classification of the Rota machines as optical instruments and appliances under item 710.90 cannot benefit defendant *under another tariff provision (i.e., item 708.89) which it rejects as an alternative classification.**

5

The short of the matter is that if defendant wished the court to consider whether the Rota machines are classifiable as optical instruments under item 708.89, it is an implicit imperative that such alternative tariff classification should have been expressly asserted by defendant as an affirmative defense. See rules 4.6 (c) and (d). Defendant's suggestion that the Rota machines are classifiable under item 708.89 was purely gratuitous in light of defendant's disclamation of that provision as an alternative classification. Manifestly, under these circumstances, it would be a gross injustice to plaintiff were the court to *sua sponte* consider item 708.89 as an alternative classification, and accordingly I decline to do so. It is unnecessary, therefore, to reach the issue of the relative specificity of items 708.89 and 678.50, which is argued by defendant.

In the absence of an alternative claim by defendant under item 708.89, or some other optical instruments provision, asserted as an affirmative defense, I am unable to agree with defendant's position that plaintiff has failed to sustain its burden of proof. As the issues have been framed by the parties, plaintiff has sustained its dual burden of proof by negating the applicability of item 710.90 and establishing its claim under item 678.50.

For the reasons stated herein, defendant's motion is denied, and an order to that effect will be entered.

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*In C.D. 4716, I noted that the issue of whether a "Strunck" ampul inspection unit is an "optical instrument" was decided favorably to defendant's classification under item 710.90 in Judge Landis' decision in *Ameco, Inc.* v. *United States*, 74 Cust. Ct. 172, C.D. 4602 (1975). *Ameco* was cited with approval in *United States* v. *Alaka America, Inc.*, 64 CCPA 60, C.A.D. 1184, 550 F. 2d 33 (1977) (footnote 4), and was followed by Judge Maletz in *Norman G. Jensen, Inc.* v. *United States*, 77 Cust. Ct. 9, C.D. 4668 (1976). However, even assuming that here the Rota machines are optical instruments, in any event they are not classifiable under item 710.90 inasmuch as they perform neither a measuring nor checking function. Moreover, I need not determine whether the Rota machines are classifiable under item 708.89 since defendant has made no alternative claim under that, or any other, provision for optical instruments.

(C.D. 4734)

NICHOLS & COMPANY, INC. *v.* UNITED STATES

Fibers

RES JUDICATA

Res judicata prevents litigation in a subsequent action between the same parties or their privies of questions or issues which were actually litigated or could have been litigated in the prior action if the prior action resulted in a final judgment on the merits.

COLLATERAL ESTOPPEL

The doctrine of collateral estoppel prevents relitigation where there has been a final judgment on the merits, in the context of a different claim or cause of action, of those issues which were actually and necessarily litigated between the same parties in a prior action, but not of those issues which might have been litigated. *Commissioner* v. *Sunnen*, 333 U.S. 591, 68 S. Ct. 715 (1948).

COLLATERAL ESTOPPEL IN CUSTOMS LAW

Although the doctrine of collateral estoppel has been deemed inapplicable in classification cases, *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 47 S.Ct. 616 (1927), it has been held to apply to reappraisement cases in order to effectuate the public policy of avoiding discrimination and the unequal administration of justice. *J. E. Bernard & Co.* v. *United States*, 66 Cust. Ct. 545, R.D. 11739, 324 F. Supp. 496 (1971).

In a reappraisement case, where a prior judgment on the merits results from the failure of the plaintiff to overcome the presumption of correctness attaching to the government's appraisement, the prior decision is an actual and necessary litigation of the valuation issue, and collateral estoppel precludes its relitigation.

CONSOLIDATION

Where a common question of law or fact exists between cases and a motion for consolidation has not been made pursuant to Rule 10.3(a), the court may consolidate the cases *sua sponte*.

SEVERANCE

In a reappraisement case involving a foreign valuation question, it is proper to sever those cases with dates of exportation which are not the same as the date of the main cases.

Court Nos. R65/11409, etc.

Ports of Boston; Wilmington, N.C.; Charleston

[Judgment for defendant.]

(Decided February 3, 1978)

Doherty and Melahn (*William E. Melahn* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

RE, Chief Judge: In this action for the reappraisement of imported merchandise both parties have moved for summary judgment pursuant to Rule 8.2(a) of this court.[1] The defendant has also moved for severance.

It is undisputed that the facts are identical to those of the test case under which the present action was suspended, *Nichols & Company, Inc.* v. *United States*, 60 Cust. Ct. 917, R.D. 11555 (1968), *aff'd*, 64 Cust. Ct. 849, A.R.D. 271 (1970), *aff'd*, 59 CCPA 67, C.A.D. 1041, 454 F. 2d 1183 (1972). The imported merchandise in both cases consists of nylon staple fibers, substandard acrylic staple fibers and first grade acrylic staple fibers. The parties have stipulated that the merchandise was included in the Final List of the Secretary of the Treasury, T.D. 54521 (1958).

In both actions the fibers were appraised on the basis of foreign value, pursuant to section 402a(c) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.[2] In the test case, and in this action, plaintiff has contended that the proper valuation is export value pursuant to section 402a(d) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.[3] In the present case plaintiff has also asserted the alternative claim of United States value,

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[1] Rule 8.2(a) provides:

"(a) Motion; Time for Filing: Subject to the provisions of paragraph (c) of this rule, a party may, at any time after a responsive pleading has been filed, move with or without supporting affidavits for a summary judgment in his favor upon all or any part of the action."

[2] Section 402a(c) of the Tariff Act of 1930, as amended, reads in pertinent part:

"(c) The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States."

[3] Export value is defined in section 402a(d) of the Tariff Act of 1930, as amended, as:

"(d) The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States."

pursuant to section 402a(e) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.[4]

As in the test case of *Nichols & Company, Inc.*, all three types of fibers were manufactured in France by Société Crylor, a member of a chemical group known as Rhone Poulenc. The fibers were sold by Rhodiaceta, the general sales agent for that group, to the West German firm of Chemfa, 80% of which is owned by Nichols & Company, Inc. Chemfa resold the merchandise to Nichols who shipped it from Bremen and Rotterdam. Rhodiaceta did not sell directly to the United States and, therefore, could not deal directly with Nichols. Negotiations for the sales contract, however, under which all shipments of the fibers were made, included a representative of Nichols. It was understood by all parties that the fibers were to be exported to Nichols. At the time of exportation of the merchandise, French law permitted the sale of fibers only on the condition that they not be resold in the French market as fibers.

In the test case, as well as in the case at bar, the country of exportation was stipulated to be France. On these facts in the test case, based on the absence of a free market in France for the imported merchandise, the trial court found that plaintiff had overcome the presumption of correctness [5] as to the foreign value basis of appraisement. The court also found that plaintiff had succeeded in establishing that export value was the proper basis of appraisement. However, since plaintiff had not introduced evidence as to export value in the French market, the presumption of correctness that attached to the appraiser's finding of the amount of value was not overcome.

That the valuation issue had been presented, tried and determined may be gleaned from the specific references in the decision of the trial court to the evidentiary value of invoice statements. The trial court stated that it found plaintiff's argument "difficult to follow," and rejected plaintiff's request that it be given an opportunity "to remedy this defect in its proofs." 60 Cust. Ct. at 922–23. Prophetically, the trial court wrote that "[p]laintiff has had its day in court,

[4] United States value is defined in section 402a(e) of the Tariff Act of 1930, as amended, as:

"(e) The United States value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale for domestic consumption, packed ready for delivery, in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise, in the usual wholesale quantities and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery, a commission not exceeding 6 per centum, if any has been paid or contracted to be paid on goods secured otherwise than by purchase, or profits not to exceed 8 per centum and a reasonable allowance for general expenses, not to exceed 8 per centum on purchased goods."

[5] The presumption of correctness, codified in 28 U.S.C. § 2635, has been interpreted to mean that the appraiser found every fact necessary to sustain the appraisement. The importer, therefore, must carry a dual burden: he must prove that the appraiser's calculation was erroneous, and also establish the claimed value as the correct dutiable value of the merchandise. *Dana Perfumes Corp.* v. *United States*, 63 CCPA 43, C.A.D. 1162, 524 F. 2d 750 (1975); *Millmaster International Inc.* v. *United States*, 57 CCPA 108, C.A.D. 987, 427 F. 2d 811 (1970).

has rested and submitted its case for decision on the proofs it adduced." To dispel any doubt the trial court explained:

> "The situation is that plaintiff has established that the merchandise at bar should be valued on the basis of export value, but it has failed to prove an export value different from the value found by the appraiser. There is a twofold presumption of correctness as to the appraiser's findings: as to basis, and as to amount. Plaintiff has overcome the presumption as to the first, the basis for appraisement. Plaintiff has adduced no proofs as to export value in the *French* market. Hence, the presumption of correctness, as to the appraiser's finding of the amount of value, has not been overcome." 60 Cust. Ct. at 923.

The Appellate Term of this court affirmed. It expressly passed upon the evidence presented in the trial court on the question of value, and held that the importer failed to rebut the presumption of correctness. In holding that Nichols had not established the absence of a foreign statutory value for "similar" merchandise as required under section 402a(c) of the Tariff Act of 1930, as amended, it stated:

> "The presumption of correctness obtaining in this case with respect to the appraisement is that the appraiser found every fact to exist which is necessary to sustain the existence of a foreign value. And the burden of proof is on appellant to rebut this presumption of correctness before undertaking to establish another value for the merchandise at bar." 64 Cust. Ct. at 855.

The Court of Customs and Patent Appeals affirmed.

Relying upon the test case, the defendant has moved for summary judgment contending that the valuation issue in both cases is the same in all material respects. It is the defendant's position that the issue of valuation was previously litigated to a valid final judgment against the same plaintiff in the test case. It therefore urges that plaintiff should be collaterally estopped from relitigating it. The defendant further contends that United States value, as an alternative claim, does not preclude the application of the doctrine of collateral estoppel. It argues that plaintiff would also have to negate any foreign or export value for such or similar merchandise before the court could examine the applicability of the United States value claim.

Plaintiff opposes defendant's motion for summary judgment on the ground that the liberal discovery rules of the United States Customs Court enacted in 1970 constitute an intervening change in the controlling law which renders the doctrine of collateral estoppel inapplicable. Plaintiff also maintains that the valuation decision in the test case was not a final judgment on the merits which would warrant the application of the doctrine of collateral estoppel. Finally, plaintiff asserts that since the defendant withheld material evidence in the

original *Nichols* case, it should not be permitted to invoke collateral estoppel.

Before reaching the merits of the defendant's motion for summary judgment, and the question of collateral estoppel, the court will consider the defendant's motion for severance. Some confusion has been caused by the fact that the scheduled appeals for reappraisement, which defendant seeks to sever, were never consolidated with consolidated case number R65/11409, the case at bar.[6] These cases are part of consolidated case number R66/493, which was suspended under the test case. Moreover, the defendant has listed in the schedule appended to its motion papers consolidated case number R67/16854, another case which was not previously consolidated with R65/11409, but which was also suspended under the test case.

Since all three consolidated cases, R65/11409, R66/493 and R67/16854, were suspended under the same test case pursuant to Rule 14.7(a),[7] it is clear that they were all found to involve the same issues of fact or law as in the test case. Thus, the "common question of law or fact" which is necessary for consolidation pursuant to Rule 10.3(a) [8] has been satisfied. In view of the requisite common question of law or fact existing in these cases, the court consolidates, *sua sponte*, case numbers R66/493 and R67/16854 under case number R65/11409.[9]

Defendant seeks severance of those reappraisement cases [10] with dates of exportation in 1963 and 1965. Defendant contends that it is proper to sever those cases since the valuation question in the motion for summary judgment pertains to merchandise exported during 1962. Since the "time of exportation" of the merchandise is crucial in considering proper valuation under foreign value, export value or United States value, defendant's motion to sever and renumber is granted.

The defendant's motion for summary judgment raises the question of the applicability of the doctrine of collateral estoppel in customs litigation.

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[6] Defendant's failure to consolidate these cases has not been raised by plaintiff.

[7] Rule 14.7(a) reads, in pertinent part:

"(a) Suspension of Actions: An action may be suspended pending the final determination of another action (hereinafter referred to as a test case) if it involves an issue of fact or a question of law which is the same as the issue of fact or question of law involved in such test case."

[8] Rule 10.3(a) states:

"(a) Consolidation: When actions involving a common question of law or fact are pending before the court, and the parties are the same, the court may order consolidation of the actions or any claims therein."

[9] The fibers which are the subject of consolidated court nos. R66/493 and R67/16854 are the same as those involved in R65/11409. R66/493 as it was initially consolidated, included sixteen appeals for reappraisement, all involving nylon staple fibers, while R67/16854 contained thirteen appeals for reappraisement all of first quality acrylic fibers. Both the nylon staple fibers in the R66/493 case and the first quality acrylic fibers in R67/16854 were appraised by the Bureau of Customs (now known as the Customs Service) at the same rates as the identical fibers were appraised in R65/11409.

[10] The court nos. which defendant seeks to sever are: R66/501; R66/502; R66/503; R66/591; R66/592; R66/593; R66/594; and R66/595. Defendant has asked that these be renumbered as consolidated court no. R66/501.

Collateral estoppel, or estoppel by judgment, is related to the doctrine of *res judicata*. Although *res judicata* shields a litigant from multiple suits and vexatious litigation, primarily it fosters the public policy which puts an end to litigation and promotes stability in human relations. The doctrine is of ancient origin and finds expression in the latin maxim "*interest reipublicae ut sit finis litium*," meaning that it is in the public interest that there be an end to litigation.

As indicated by the Supreme Court of the United States in *Commissioner* v. *Sunnen*, 333 U.S. 591, 596–97, 68 S. Ct. 715 (1948), *res judicata* prevents relitigation in a subsequent action between the same parties, or their privies, of questions or issues which were actually litigated or could have been litigated in the prior action, if the prior action resulted in a final judgment on the merits. In contrast, a prior judgment between the same parties based on a different claim or cause of action may invoke the doctrine of collateral estoppel. Unlike *res judicata*, collateral estoppel precludes a relitigation in the second action of only those issues which were actually litigated in the prior action, but not those which might have been litigated. *Commissioner* v. *Sunnen*, 333 U.S. at 598.

Since a party may be precluded from relitigating an issue, the *Restatement of the Law of Judgments* describes collateral estoppel under the heading of "issue preclusion." If the second action is based on the same claim as the first, the issue preclusion is sometimes called direct estoppel, whereas if it is on a different claim, it is referred to as collateral estoppel. In a recent proposed draft, the *Restatement* describes the doctrine as follows:

> "§ 68 Issue Preclusion – General Rule
>
> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Restatement (Second) of Judgments*, § 68 at 1 (Tentative Draft No. 4, 1977).

In customs litigation the application of the doctrine of collateral estoppel has depended upon whether the case pertained to the classification or the reappraisement of imported merchandise. Because of the particular problems inherent in classification litigation, collateral estoppel has been held to be inapplicable in classification cases. In the seminal case of *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 47 S. Ct. 616 (1927), the Supreme Court held that a decision of the Court of Customs Appeals on the classification of imported merchandise was not determinative of a later importation of the same type merchandise by the same importer, even though the issues were the same.

In *Stone & Downer*, the court explained as follows the reasons which justified limiting the finality of the conclusion in customs classification cases to the identical importation:

> "The evidence which may be presented in one case may be much varied in the next. The importance of a classification and its far-reaching effect may not have been fully understood or clearly known when the first litigation was carried through. One large importing house may secure a judgment in its favor from the Customs Court on a question of fact as to the merchandise of a particular importation, or a question of construction in the classifying statute. If that house can rely upon a conclusion in early litigation as one which is to remain final as to it, and not to be reheard in any way, while a similar importation made by another importing house may be tried and heard and a different conclusion reached, a most embarrassing situation is presented. The importing house which has, by the principle of the thing adjudged, obtained a favorable decision permanently binding on the Government will be able to import the goods at a much better rate than that enjoyed by other importing houses, its competitors. Such a result would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion. In the same way, if the first decision were against a large importing house, and its competitors instituted subsequent litigation on the same issues, with new evidence or without it, and succeeded in securing a different conclusion, the first litigant, bound by the judgment against it in favor of the Government, must permanently do business in importations of the same merchandise at great and inequitable disadvantage with its competitors.
>
> These were doubtless the reasons which actuated the Court of Customs Appeals when the question was first presented to it to hold that the general principle of *res judicata* should have only limited application to its judgments. . . . The fact that objection to the practice has never been made before, in the history of this Court or in the history of the Court of Customs Appeals in eighteen years of its life, is strong evidence not only of the wisdom of the practice but of general acquiescence in its validity." 274 U.S. at 236–37.

A different judicial attitude has prevailed as to the application of the doctrine of collateral estoppel to reappraisement cases. In *J. E. Bernard & Co.* v. *United States*, 66 Cust. Ct. 545, R.D. 11739, 324 F. Supp. 496 (1971), this court held that reappraisement cases, unlike classification cases, were close conceptually to tax cases and other non-customs litigation, and thus more suitable to the application of collateral estoppel. In reappraisement cases the public policy of avoiding discrimination and the unequal administration of justice was deemed to be best served by the application of the doctrine of collateral estoppel.

In the *Bernard* case, based upon the analogy of reappraisement cases to tax cases, this court applied to a reappraisement case the

doctrine of collateral estoppel as enunciated by the Supreme Court in *Sunnen*. Restating the requirements for collateral estoppel Judge Maletz, writing for this court in *Bernard*, stated:

> "(1) Where two cases involve income taxes in different tax years, collateral estoppel must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first and where the controlling facts and applicable legal rules remain unchanged; (2) collateral estoppel is inapplicable in litigation regarding income taxes for different years where decisions of the Court intervening between the earlier and later litigation have changed the applicable legal principles; (3) if the relevant facts in the two cases are separable, even though they are similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." 66 Cust. Ct. at 549. (Citations omitted.)

In *Bernard*, since these criteria were satisfied, the doctrine of collateral estoppel was applied to preclude relitigation in a case with facts very similar to those of the case at bar. The plaintiff in *Bernard* had previously imported six purifiers which were the subject of *Globe Shipping Co.* v. *United States*, 63 Cust. Ct. 639, R.D. 11687 (1969). In *Globe*, the importer challenged the government's constructed value appraisement which was based on invoice price. The importer claimed that either export value or constructed value based on invoice price, plus packing, less 20% should have been the proper appraisement. Because of the plaintiff's failure to introduce evidence of market value necessary to prove either the export value or the constructed value claim, the court upheld the government's appraisement. No appeal was taken of the court's decision. In the present case, there was an appeal of the test case to the Appellate Term of this court, and also to the Court of Customs and Patent Appeals, both resulting in an affirmance of the judgment of the trial court.

The subsequent litigation in *Bernard* pertained to a shipment by the same exporter of three identical purifiers which were sent at the same price to the same importer under the same order and contract as the prior merchandise. The case was submitted to the court on the record of the earlier case. There was no additional evidence submitted, and no other issues were raised. The court found that the only distinction between the two cases was that different importations were involved and, therefore, two separate causes of action. Applying the criteria set forth in the *Sunnen* case, this court concluded that, since the "matters which had been decided in the first case had remained static, factually and legally," collateral estoppel required that the prior judgment be deemed conclusive. Hence, a relitigation of the question of value was precluded. 66 Cust. Ct. at 552.

The doctrine of collateral estoppel was also applied in the subsequent case of *H. M. Young Associates, Inc.* v. *United States*, 69 Cust.

Ct. 155, C.D. 4388, 349 F. Supp. 1007 (1972), *aff'd*, 62 CCPA 20, C.A.D. 1138, 505 F. 2d 721 (1974) in which the facts are also similar to those in *Nichols*. In *H. M. Young*, the appellate court recast as follows the *Sunnen* formula made applicable to reappraisement cases by *Bernard*:

> "(1) Were the issues decided in the prior action identical with those presented in the instant action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the plea is asserted a party, or in privity with a party, to the prior action? *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948)." 62 CCPA at 22.[11]

In *H. M. Young*, the Court of Customs and Patent Appeals applied these criteria to the second reappraisement case involving elastic fabric, and found that the merchandise, the parties and the facts were the same as those in the earlier case of *H. M. Young Associates, Inc.* v. *United States*, 64 Cust. Ct. 642, R.D. 11695 (1970). The appellate court noted that the only outstanding question was whether the issues were the same in both cases. The fabric had been imported by H. M. Young, entered at the invoice price and resold by Jaymar-Ruby, Inc. (Jaymar). Jaymar paid patent royalty and trademark certification fees to parties who were neither importers nor manufacturers, and these fees were added by the government to their constructed value appraisement. The court in the first case found that these fees were improperly added to the determination, and that the importer was entitled to rely on the separability rule under the presumption of correctness attaching to the remainder of the reappraisement. In view of an intervening decision by the appellate court on the separability rule, defendant contended that there was an intervening change of law which raised an issue not litigated in the prior case. The appellate court held that the intervening decision had not changed the legal climate. Therefore, it did not prevent the application of the doctrine of collateral estoppel.

The public policy reason for the application of both *res judicata* and collateral estoppel is to prevent repetitious litigation. *Commissioner* v. *Sunnen*, 333 U.S. 591, 68 S.Ct. 715 (1948). See *Von Moschzisker*, "*Res Judicata*," 38 Yale L.J. 299 (1928–1929). A similar expression of policy may be found in the Court of Customs and Patent Appeals case

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[11] The court need not apply collateral estoppel if special factors would cause an injustice. In a case decided before *H. M. Young*, collateral estoppel was not applied even though the issues of fact and law, and the parties were the same as in a prior case in which there was a final judgment on the merits. The defendant's motion to dismiss the appeal for reappraisement on the ground of collateral estoppel was denied since an injustice would have resulted by the application of the doctrine. The reasons for the injustice were the failure of the defense to interpose the claim until after trial and submission of plaintiff's brief; submission by plaintiff of new evidence without defendant's objections; and the inability of the court to find "that the new litigation was truly needless or redundant." *Service Afloat, Inc.* v. *United States*, 68 Cust. Ct. 225, 226, R.D. 11761, 337 F. Supp. 458 (1972), *aff'd*, 70 Cust. Ct. 275, A.R.D. 311, 353 F. Supp. 885 (1973), *appeal dismissed*, 60 CCPA 185 (1973).

of *Seven-Up Co.* v. *Bubble Up Corp.*, 50 CCPA 1012, 1016, P.A.D. 6881, 312 F. 2d 472, 475 (1963):

> "It is the essence of *res judicata* that an end should be put to litigation—that when the parties have previously litigated a cause, they are barred from litigating the matter anew in a separate action. *Cromwell* v. *County of Sac*, 94 U.S. 351. If the second suit is for a different cause of action, any facts actually determined in the first suit between the same parties are conclusively established."

In the present *Nichols* case, it is clear that the standards enunciated in *Sunnen*, restated by both this court and the appellate court in *Bernard* and *H. M. Young*, have been satisfied. The legal issue presented here, i.e., the proper valuation of the imported merchandise, has already been decided by the final judgment in the test case of *Nichols & Company, Inc.* v. *United States*, 60 Cust. Ct. 917, R.D. 11555 (1968). Consequently, since the plaintiff is precluded from relitigating this issue by the doctrine of collateral estoppel, defendant's motion for summary judgment is granted. This holding furthers the public policy considerations expressed in *Sunnen* and *Seven-Up Co.* which prevent and preclude repetitious litigation of issues which have already been decided.

The initial requirement for collateral estoppel, that the controlling facts remain static, has been satisfied. Clearly, in both *Nichols* cases, the parties are the same.[12] As in both *Bernard* and *H. M. Young*, the only factual distinction between the two *Nichols* cases is that there are different importations. In the present *Nichols* case, as in the prior *Nichols* case, i.e., the test case, the same three types of merchandise were sent by the same French exporter to the same United States importer during the same periods of time. Likewise, the same foreign value appraisement was found by the Customs Service. Finally, as in *Bernard*, all the shipments were made under the same contract. In view of this identity of salient facts, there is no dispute that the facts cannot be considered "separable."

Since the applicable legal principles have remained unchanged, another requirement has been met. The revision of the rules of this court on discovery, subsequent to the first *Nichols* case, is not the type of "change or development in the controlling legal principles" contemplated by *Sunnen*. See also *State Farm Mutual Automobile Insurance Co.* v. *Duel, Commissioner of Insurance*, 324 U.S. 154, 65 S.Ct. 573 (1945) and cases cited therein.

There is also the required identity of issues for the application of collateral estoppel. The issue presented in the first *Nichols* case per-

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[12] Since the parties are the same, it is not necessary to discuss developments in the law dispensing with the requirement of mutuality of parties for the application of the doctrine of collateral estoppel. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320 *et seq*, 91 S.Ct. 1434 (1971); *Shore* v. *Parklane Hosiery Co.*, 565 F. 2d 815, 818-19 (2d Cir., Nov. 1, 1977).

tained to the correctness of the government's appraised valuation of the imported fibers. This issue was the central question decided by the judgments of the trial court, the intermediate appellate court and the Court of Customs and Patent Appeals. Since the present case attempts to raise and relitigate the same valuation issue, the requirement for an identity of issues is likewise satisfied. This identity of issues exists even though the importations which gave rise to the dispute took place at different times. That this difference in time is insignificant is indicated by the *Restatement of the Law of Judgments*, § 68, comment (c), which describes a case in which "the overlap [of events] is so substantial that preclusion is plainly appropriate."

The final requirement for the application of collateral estoppel is that the issue was actually and necessarily litigated to a final judgment on the merits. Plaintiff asserts that the test case decision on export value did not actually litigate the merits of the valuation issue. It argues that the court premised its decision upon the failure of the importer to carry its initial burden of disproving foreign value for "similar" merchandise, and, therefore, never actually litigated the merits of the question of export value.

As was necessary in the first *Nichols* case, plaintiff in the case at bar must prove that the appraisement of the customs officials is incorrect, and that its claimed basis of reappraisement is correct. 28 U.S.C. § 2635. Clearly, both the Appellate Term of this court and the Court of Customs and Patent Appeals held in that case that the plaintiff failed to discharge its burden of negating the correctness of the foreign value appraisement. On three occasions the valuation issue in the first *Nichols* case was raised, and in both decisions of the appellate courts it was determined unnecessary to reach the claimed basis of appraisement. Having found that plaintiff had not shown that the appraisement was wrong, it was not necessary to proceed to determine whether any claimed appraisement was correct. It cannot be denied that the specific question or issue presented in the prior case was the correctness of the appraisement. The correctness of the valuation was not only put in issue by the pleadings and litigated at the trial, but was clearly submitted to the court for its determination, and a final decision was rendered.

In *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F. 2d 451, 459–60 (1971), the Court of Appeals for the Fifth Circuit, citing the *Restatement of Judgments*, stated:

> "As a general rule, where a question of fact is put in issue by the pleadings, and is submitted to the jury or other trier of facts for its determination, and is determined, that question of fact has been 'actually litigated.' *Restatement of Judgments* § 68, comment (c) (1942)."

It is significant to note that the recent commentary to the cited section 68 of the *Restatement* explicitly includes a determination based

upon a failure to sustain one's burden of proof. From the following, the view of the *Restatement* on "when an issue is actually litigated" is made eminently clear:

> "When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. * * * *A determination may be based on a failure* of pleading or *of proof as well as on the sustaining of the burden of proof.*" *Restatement (Second) of Judgments*, § 68, comment (d) at 6–7 (Tentative Draft No. 4, 1977). (Emphasis added.)

Although the decision in the first *Nichols* case was premised upon the plaintiff's failure to overcome the presumption of correctness attaching to the appraisement, it cannot be doubted that the valuation issue was nonetheless "actually litigated." The critical factors are that the valuation issue was raised, actually put before the court and finally determined.

The *Sunnen* case indicated that, for collateral estoppel to apply, the issues which are sought to be relitigated must be "identical in all respects" with those decided in the first action. This has been interpreted to require that the issues have been actually and necessarily litigated in the first case. *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89, 100–101, 74 S. Ct. 414 (1954), *reh. denied*, 347 U.S. 931, 74 S. Ct. 527 (1954);[12] *United States* v. *International Building Co.*, 345 U.S. 502, 506, 73 S. Ct. 807 (1953), *reh. denied*, 345 U.S. 978, 73 S. Ct. 1120 (1953).

The *Partmar* case is analogous to the case at bar in that, in both cases, the first decision held that plaintiff failed to sustain its burden of proof on an issue which was sought to be relitigated in the subsequent action. In *Partmar*, the decision in the first action held that Paramount leases and agreements were not in violation of the Sherman Act since Paramount had not participated in any conspiracy in restraint of trade. That determination was sufficient to invoke a collateral estoppel to preclude Partmar from relitigating the conspiracy issue in the second action which was a treble damage counterclaim against Paramount. The crucial factor in the court's application of collateral estoppel to the treble damage action was its determination that the conspiracy question had already been decided in the first case since that finding had been necessary to the earlier judgment.

In the case at bar the Court of Customs and Patent Appeals found that the plaintiff failed to disprove the appraiser's foreign value appraisement for "similar" merchandise. That finding was "necessary" to the court's holding that plaintiff did not overcome the presumption

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[12] In the *Application of Clark*, 187 P.Q. 209, P.A.D. 75-505, 522 F. 2d 623, 634 (1975), although a patent case, Judge Miller of the Court of Customs and Patent Appeals, in a concurring opinion, approvingly referred to the *Partmar* case as having held that "[a]n essential element of the rule of collateral estoppel is substantial identity of the issue or issues in each action." See also *In re Pritchard*, 59 CCPA 1284, P.A.D. 8665, 463 F. 2d 1359, 1364 (1972).

of correctness attaching to the foreign value appraisement. Thus, the legal situation in the case at bar is similar to that in *Partmar*. The issues which were the subject of collateral estoppel—conspiracy in *Partmar* and the proper valuation of imported merchandise here—were actually and necessarily raised, litigated and decided in prior actions.

The court's decision in the first *Nichols* case is clearly a decision "on the merits." "Merits" have been defined as the "real or substantial ground or grounds of action or defense, as distinguished from matters of practice, procedure, jurisdiction or form." *Clegg* v. *United States*, 112 F. 2d 886 (10th Cir. 1940). See also *Providential Development Co.* v. *United States Steel Co.*, 236 F. 2d 277 (10th Cir. 1956). Decisions based upon failures of proof have been held to be on the substantial grounds of a case, and, therefore, are decisions "on the merits." *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622 (4th Cir. 1955), *cert. denied*, 350 U.S. 838, 76 S.Ct. 76 (1955), *reh. denied*, 350 U.S. 905, 76 S.Ct. 177 (1955), *reh. denied*, 352 U.S. 913, 77 S.Ct. 144 (1956). See *North Counties Hydro-Electric Co.* v. *United States*, 138 Ct.Cl. 380, 383, 151 F. Supp. 322, 324 (1957). See also *Restatement (Second) of Judgments*, § 68, comment (d) at 6–7 (Tentative Draft No. 4, 1977).

Thus, as with the "actually litigated" standard, the omission of the appellate courts in the first case to "reach the question of another value for the merchandise" does not mean that the decision was not "on the merits." As stated by Mr. Justice Frankfurter in *Angel* v. *Bullington*, 330 U.S. 183, 190, 67 S.Ct. 657 (1947):

> "It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the "merits" in the sense of the *ultimate* substantive issues of a litigation." (Emphasis added.)

In the first *Nichols* case the appellate courts considered and decided the "merits" of plaintiff's claim by their holdings that the plaintiff had failed to overcome the presumption of correctness attaching to the appraisement. These holdings addressed directly the crux of the valuation issue before the court, i.e., whether the valuation by the customs officials was erroneous. It was not a mere subsidiary issue of procedure, but the real or substantial ground of the case. Since the prior case was decided "on the merits," the plaintiff is estopped from relitigating the issue of value in the present action.

In order to prevail in the present action, plaintiff must raise the valuation issue and overcome the presumption of correctness attaching to the appraisement of the customs officials. To meet this burden, it must negate the existence of foreign value for such or similar merchandise for the imported merchandise. This issue cannot be

relitigated. Since the holding that plaintiff did not negate the existence of foreign value was necessary in the prior case, and since that issue was litigated and actually decided on the merits, plaintiff is estopped from raising it anew.[14]

The statute which sets forth plaintiff's burden of proof in order to prevail in any matter in the Customs Court states that "[t]he decision of the Secretary of Treasury, or his delegate, is presumed to be correct," and that "[t]he burden to prove otherwise shall rest upon the party challenging a decision." 28 U.S.C. § 2635. Plaintiff had its opportunity "to prove otherwise" in the first *Nichols* case. It failed to bear this burden.

In view of the foregoing, it is not necessary to discuss plaintiff's alternative claim of United States value. In the absence of any support in the moving papers it is likewise unnecessary to pass upon the plaintiff's allegation that the defendant withheld material evidence. Without a clear showing of some fundamental unfairness in the prior proceeding, to fail to apply the doctrine of collateral estoppel would do violence to the socially desirable policies that it is designed to foster. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328, 91 S.Ct. 1434 (1971); *Shore* v. *Parklane Hosiery Co.*, 565 F. 2d 815, 819, 821–22 (2d Cir. 1977).

Plaintiff's motion for summary judgment is denied, and defendant's motion for summary judgment and severance is hereby granted.

Judgment will issue accordingly.

(C.D. 4735)

RENE D. LYON CO., INC. *v.* UNITED STATES

Toy figures—Christmas ornaments

Miniature animal figures were classified by the government under item 737.40 of the tariff schedules as toy figures of animate objects and assessed duty of 24% ad valorem. Plaintiff claims that the imported figures are properly classifiable under item 772.97 as other Christmas ornaments of rubber or plastics, dutiable at 11.5% ad valorem. Alternatively, plaintiff claims classification under item 774.60 as other articles of rubber or plastics, not specially provided for, which are also dutiable at 11.5% ad valorem. *Held:* Plaintiff has failed to overcome the presumption of correctness attendant upon the government's classification of the imported articles under item 737.40 as toy figures of animate objects. Further,

[14] In the recent case of *Arnold Pickle & Olive Co.* v. *United States*, 79 Cust. Ct. 50, 52, C.D. 4712, 435 F. Supp. 921, 922 (1977), the court specifically found the government's appraisement to be wrong, and stated that "it could not be correct to estop [the parties] from litigating an issue which was not resolved in the first case—the correct value of the imported merchandise."

even assuming *arguendo* that plaintiff has overcome this presumption, plaintiff has failed to prove its claim that the imported articles are in chief value of plastics.

Court No. 71-8-00721

Port of New York

[Judgment for defendant.]

(Decided February 6, 1978)

Serko & Simon (*Gerald B. Horn, Carl R. Soller,* and *Margaret Hardy Sachter* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis* and *Mark K. Neville, Jr.,* trial attorneys), for the defendant.

MALETZ, Judge: This case involves the proper tariff classification of merchandise consisting of assorted miniature animal figures invoiced as "Holiday Animal Assortment" (Item No. 1215), "Night before X'mas Red Mouse Doll" (Item No. 2111), and "Assortment of Animals" (Item No. 2112). The articles which were imported from Japan via the port of New York in 1970 were classified by the government under item 737.40 of the Tariff Schedules of the United States, as modified by T.D. 68-9, as other toy figures of animate objects, not stuffed, and assessed duty at the rate of 24% ad valorem.

Plaintiff claims that the imported articles are properly classifiable under item 772.97, as modified by T.D. 68-9, as other Christmas ornaments of rubber or plastics, dutiable at the rate of 11.5% ad valorem. Alternatively, plaintiff claims classification under item 774.60, as modified by T.D. 68-9, as other articles of rubber or plastics, not specially provided for, which are also dutiable at the rate of 11.5% ad valorem.

The pertinent provisions of the tariff schedules read as follows:

Classified under:

Subpart E [Schedule 7, Part 5] headnotes:

> 1. The articles described in the provisions of this subpart (except parts) shall be classified in such provisions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules * * * —
>
> * * * * * * * *
>
> 2. For the purposes of the tariff schedules, a "toy" is any article chiefly used for the amusement of children or adults.
>
> * * * * * * * *

	Toy figures of animate objects (except dolls):	
	Not having a spring mechanism:	
	* * * * * * *	
	Not stuffed:	
	* * * * * * *	
737.40	Other	24% ad val.

Classification claimed by plaintiff:

Subpart C [Schedule 7, Part 12]:

	* * * Christmas ornaments; * * *; all the foregoing * * * of rubber or plastics:	
772.95	Christmas tree ornaments	* * *
772.97	Other	11.5% ad val.

Alternative classification claimed by plaintiff:

Subpart D [Schedule 7, Part 12]:

	Articles not specially provided for, of rubber or plastics:	
	* * * * * * *	
774.60	Other	11.5% ad val.

We consider first the legal principles applicable here. And on this aspect, it is basic that there is a presumption of correctness attendant upon the classification of the imported articles under item 737.40 as toy figures of animate objects. This presumption, of course, attaches to each subsidiary fact necessary to support that conclusion. In this circumstance, plaintiff has the twofold burden of establishing that the presumptively correct classification of the imported articles as toy figures was in error and that the articles are properly classifiable either under item 772.97 as other Christmas ornaments in chief value of rubber or plastics or alternatively under item 774.60 as articles not specially provided for in chief value of rubber or plastics. Thus, to prevail on its principal claim, it was incumbent upon plaintiff to prove that the importations were not chiefly used for the amusement of children or adults [1] but rather were chiefly used for Christmas ornaments and were in chief value of rubber or plastics.[2] To prevail on its alternative claim, plaintiff has the burden of establishing that the importations were not chiefly used for the amusement of children or adults, were not chiefly used for Christmas ornaments, and were in chief value of rubber or plastics.

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[1] An object is one of amusement under the tariff schedules if its "purpose * * * is to give the same kind of enjoyment as playthings give, * * * whether the object is to be manually manipulated, used in a game, or * * * worn." *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, 159, C.A.D. 1022, 440 F. 2d 1384, 1385 (1971).

[2] In this connection, it has been consistently held that articles chiefly used for ornamental purposes are outside the scope of the toy provisions. See, e.g., *Amico, Inc.* v. *United States*, 73 Cust. Ct. 150, 152, C.D. 4568 (1974).

In order to establish its claims, plaintiff called two witnesses [3] and introduced in evidence three representative samples from the six animal figures invoiced as the "Holiday Animal Assortment" (Item No. 1215) consisting of a mouse, a squirrel and an elephant (plaintiff's exhibit 1). Plaintiff also introduced in evidence its 1970 catalogue (plaintiff's exhibit 2).[4]

Examination of the samples shows that the mouse is approximately 3" in height, is dressed in a red felt jacket with a green felt collar, and is composed of two egg-shaped styrofoam configurations flocked with purple rayon fibers. The feet, ears, arms, hands and tail are of purple or white textile material, with all but the ears reinforced with wire to hold their shape. The feet are considerably oversized and are reinforced by wire in such a way as to enable the figure to be free standing. The eyes and nose are of plastic as is a banjo which is affixed to the figure. A gold-colored nylon string formed into a loop is attached behind one ear.

The squirrel is about 3½" high, is dressed in a light green felt jacket with a darker green felt collar, and is composed of two egg-shaped styrofoam configurations flocked with red rayon fibers. The feet, eyes, ears, arms, hands and tail are of red or white textile material, with the feet, arms and hands reinforced with wire to hold their shape. Like the mouse, the feet of the squirrel figure are considerably oversized and are reinforced by wire in such a way as to enable the figure to be free standing. The squirrel has a white flannel stripe down the facial portion which ends at a plastic button nose. A gold-colored nylon string formed into a loop is attached at the top of the head.

The elephant is about 4½" high, is dressed in a pink felt jacket with a white felt collar and has a matching pink felt conical hat with a white pompon on top. The figure is composed of two egg-shaped styrofoam configurations flocked with bright green rayon fibers. The feet, ears, trunk, arms, hands and tail are of gray or white textile material, with all but the ears reinforced with wire to hold their shape. Like the other two figures, the feet are considerably oversized and are reinforced in such a way as to enable the figure to be free standing. The eyes are of a plastic material and a gold-colored nylon string formed into a loop is attached through the hat.

The "Night before X'mas Red Mouse Doll" (Item No. 2111) is depicted in the catalogue as a figure of an animated mouse, 6½" high, red and white in color and comical in appearance. Finally, the "Assortment of Animals" (Item No. 2112) consists, according to the catalogue, of a dozen animal figures which are similar to the "Holiday

[3] The two witnesses called by plaintiff were Martin Halpern, plaintiff's import manager, and John Adams, plaintiff's national sales manager.

[4] Defendant did not present any evidence.

Animal Assortment" figures and come in four styles, i.e., a "Blue Dog," "Red Squirrel," "Yellow Lion", and "White Cat."

To support its contention that the imported animal figures were chiefly used as Christmas ornaments, plaintiff called John Adams, its national sales manager as a witness. Mr. Adams testified that plaintiff sells figures such as those involved here to all types of retail stores, florists, department stores and such toy stores as have Christmas departments. He said that the figures are sold by plaintiff's salesmen through the use of the company's catalogue and through trade shows such as gift shows, variety merchandise shows, international toy and decor shows and premium shows. Mr. Adams further testified that larger department stores have different buyers for different departments and that at those stores plaintiff's salesmen sell the figures to the trim and tree buyers and not to the toy buyers. He added that in the smaller stores the buyer "crosses over" and buys many different lines of merchandise. The witness could not state what percentage of figures was sold to stores that had separate and distinct Christmas departments and Christmas buyers.

With regard to the plaintiff's 1970 catalogue, Mr. Adams pointed out that Item 1215 (i.e., the "Holiday Animal Assortment") appears on a page in which only Christmas ornaments and decorations are depicted, while the other two items in issue, i.e., Items 2111 and 2112, are shown on a page of the catalogue which covers electric Christmas trees, light sets, reindeer, Santas, and other figures.

Mr. Adams indicated that while he did not use the imported figures on his own Christmas trees, he used similar animal figures. He further stated that while the figures such as those in issue are specifically used as Christmas tree ornaments, they can be placed on mantels, used over fireplaces, and put in wreaths and other decorative places in the home to add to the Christmas spirit. According to Mr. Adams, animal figures of this kind lend a fantasy and fairyland atmosphere which adds to the Christmas spirit and are used in the sense of "enhancing any Christmas decoration." The witness said that he has seen "animal items" used by neighbors and friends on Christmas trees but has never seen children play with them. He could not remember if his observations as to such use occurred in 1970.

As for the samples in evidence, Mr. Adams testified that the imported animal figures themselves do not have a specific Christmas connotation and indicated that all of the importations had a comical aspect to them. He stated that if he saw the articles in toy stores or a toy department, he would think they were toys for small children. In fact, he stated, the only basis for designating the article as a Christmas article rather than a toy is the department in which it is sold and the loop or string on it. In his opinion the string would have no pur-

pose if the article were a toy. He further indicated that if a person took a toy home, put a string on it and hung it on a Christmas tree, it would be a Christmas ornament or decoration.

Lastly, Mr. Adams testified that he had no way of knowing whether a purchaser used an imported figure in his home as a Christmas decoration; however, he expressed the opinion that if the figure was bought in a Christmas decoration section, the purchaser would use it for a decorative purpose.

As additional support for its contention that the imported animal figures were chiefly used as Christmas ornaments, plaintiff also places emphasis on the testimony of Martin Halpern, its import manager, that the imports in question were sold primarily in florist shops, Christmas shops, gift shops, etc. When asked whether or not the merchandise was sold in toy stores, Mr. Halpern testified that while plaintiff may have certain toy customers, it sells primarily to Christmas departments. He went on to say that in stores having both toy departments and trim and tree departments, plaintiff would sell to the trim and tree department.

Against this background, the essence of plaintiff's case is (1) that since the imported figures were not generally sold to toy stores but rather to stores and departments of stores handling Christmas decorations; and (2) that since the figures appeared in plaintiff's catalogue at pages covering Christmas decorations or ornaments, the imported figures are *ipso facto* classifiable as Christmas decorations or ornaments rather than as toys. In short, the basic underpinning for plaintiff's case is the manner in which the imports were merchandised. The difficulty with this, however, is that "[w]hile the manner in which an article is merchandised is one of the factors to be considered in determining its classification, it is not determinative." *Russ Berrie & Co., Inc.* v. *United States*, 76 Cust. Ct. 218, 226, C.D. 4659, 417 F. Supp. 1035, *appeal dismissed*, 63 CCPA 125 (1976). As the appellate court stated in *United States* v. *Ignaz Strauss & Co., Inc.*, 37 CCPA 32, 35–36, C.A.D. 415 (1949): "Neither is reliance upon the merchandising medium through which articles may be sold always a proper criterion through which to judge their classification. It would seem that under present day mercantile practices almost everything salable is sold by almost every merchant." These considerations are equally applicable here where the record indicates that the various stores which purchased the imported articles from plaintiff displayed and sold many different types of merchandise, including Christmas decorations, toys, etc.

Also militating against plaintiff's contention that the imported figures are chiefly used as Christmas ornaments are the samples themselves. For the samples admittedly have no inherent Christmas connotation and are comical in appearance. Indeed, an examination of

the samples indicates that the animals which are given human attributes through dress and posture appear to be well suited to create amusement. Thus, plaintiff's main witness Adams testified that if he saw the articles in a toy store, he would think they were toys for small children. In fact, he conceded that the only basis for considering that the figures were Christmas articles rather than toys is the department in which they were sold and the fact that they had a string or loop on them. The illogical nature of this conclusion is demonstrated by the witness' further testimony that if a person took a toy home, put a string on it and hung it on a Christmas tree, the article would be a Christmas ornament or decoration.

The crux of the matter is that plaintiff's proof falls far short of that necessary to establish that the imported figures were chiefly used as Christmas ornaments. In other words, plaintiff has failed to overcome the presumption of correctness attendant upon the classification of the imported articles under item 737.40 as toy figures of animate objects.

But even assuming *arguendo* that the plaintiff has shown that the importations were not chiefly used for the amusement of children or adults and thus were not toy figures, it still would not have sustained its burden because it has not proven that the articles are in chief value of plastics—proof of which is crucial to both of its alternative claims.

What proof is necessary to establish the component material of chief value was set out recently in *J. C. Penney Purchasing Corporation* v. *United States*, 77 Cust. Ct. 48, 58, C.D. 4671 (1976) as follows:

> Inasmuch as General Headnotes and Rules of Interpretation, headnote 9(f)(i) states that the term "of" when used between the description of an article and a material means that the article is wholly or in chief value of the named material, it was plaintiff's burden, in order to establish its claim under item 791.75, to prove * * * the component material of chief value * * *.
>
> The proper method of determining the chief value of these importations is to ascertain the costs of the separate component materials at the time when they have reached the state when nothing further need be done to them except combine them into the completed article. * * *
>
> In computing the component material of chief value, labor performed on the individual component materials prior to combination into the completed article is considered as part of the component's value. * * * Further, the costs of any processing done on component materials to permit their uniting with other materials in manufacturing an article are attributable to the material and must be considered in determining the component material of chief value. However, costs incurred in uniting the materials into the finished article are not considered in the chief value computation. * * *

With these considerations in mind, plaintiff has made no attempt to establish the costs of the individual components of the importations at the time they were ready to be combined into the finished article. In lieu of such evidence, it presented the testimony of its import manager, Martin Halpern, whose duties included negotiating price, delivery, quality and packing with the Japanese manufacturer of the articles. Mr. Halpern stated that while it was his responsibility to make determinations as to the chief value of plaintiff's importations for duty purposes, he did not know the exact cost of the materials used in the manufacture of the importations. However, even though he never purchased any of the materials himself in Japan, he stated that he was aware of the relative costs of such materials in Japan in 1970. He then testified that the imported figures were in chief value of plastics. He added that he was able to determine this by "looking at the item and feeling it."

Mr. Halpern testified that he believed that the styrofoam (a plastic material) contained in the importations was more expensive than the textile material. This belief was predicated on his experience and expertise in the Japanese market. However, Mr. Halpern did not know when the manufacturer purchased the component materials that went into the imported merchandise or when the imported merchandise was finally assembled ready for shipment.

Mr. Halpern did not know the cost of any of the components of the imported merchandise immediately prior to joinder into the finished article, nor did he know the cost of labor to the manufacturer in getting the various components of the imported merchandise in condition ready for assembly into the finished article. Halpern stated that he could *estimate* the cost of labor based on his experience in manufacturing corsages, *prior to 1959*. These labor costs were estimated at 10% which, according to the witness, was a manufacturer's "rule of thumb."

The witness also testified as to various percentages of what he believed the relative costs of the flannel and styrofoam should be although he admitted he did not know the exact cost figures. Regarding the percentage cost figure for the styrofoam, he first stated it was based on the total cost of the article to plaintiff but later retracted that statement and contended that the figure was based on a paper the manufacturer had sent to him. He was not sure but believed this paper referred to cost percentages for 1976 and not 1970.

From the above, it is clear that plaintiff has not established a *prima facie* showing of component material of chief value within the guidelines quoted above from *Penney*. However, plaintiff points out that proof of the costs of each component need not be presented where the most casual examination of the sample shows that only one material can be the component of chief value (*John S. Connor*,

Inc. v. *United States*, 54 Cust. Ct. 213, C.D. 2536 (1965)) or where a *prima facie* showing is made by a broad conclusory statement of a witness who should know (*Chas. Kurz Co.* v. *United States*, 57 Cust. Ct. 73, C.D. 2733 (1966)).

We first consider whether or not a casual examination of the samples shows that only plastic can be their component material of chief value. Such examination reveals the following: (1) the mouse consists of a head, body, eyes, nose and musical instrument of plastic, while the flocking, feet, ears, arms, hand, tail, jacket and collar are of textile material, and the feet, tail, arms and hands are reinforced with metal wire; (2) the squirrel consists of a head, body and nose of plastic, while the flocking, feet, eyes, ears, arms, hands, tail, jacket and collar are of textile material, and the feet, arms and hands are reinforced with metal wire; and (3) the elephant consists of a head, body and eyes of plastic, while the hat, flocking, feet, ears, trunk, arms, hands, tail, jacket and collar, are of textile material, and the feet, trunk, arms, hands and tail are reinforced with metal wire. The strings attached to each animal figure are made of nylon.

The textile material in the figures must be cut to size, shaped and placed on the styrofoam body. There are labor charges for each of the textile components, whereas there was manifestly no labor cost, prior to assembly, for the styrofoam.

In short, an examination of the samples discloses that either the plastic, the textile material or the metal wire can be the component material of chief value of the imported merchandise. Under these circumstances, an examination of the samples scarcely demonstrates that plastic is the component material of chief value.

With regard to the second exception regarding conclusory statements of the component materials by a witness who should know the costs thereof, the cross-examination of Mr. Halpern showed that he was totally unqualified to testify as to such costs. As we have seen, Mr. Halpern did not know the cost of any of the components of the imported merchandise immediately prior to joinder into the finished article, nor did he know the cost of labor to the manufacturer in getting the various components of the imported merchandise in condition ready for assembly into the finished article. And although he stated that he was charged with the duty of knowing the chief value of his company's imports, there was nothing in his testimony which persuaded the court that he did know such values. With regard to labor, Halpern *estimated* this at a blanket 10% on each component based on his manufacturing experience *prior to 1959*. In this connection the proper method that must be used in computing component material of chief value is the cost to the manufacturer at the *time* of assembly and *estimates* and *ratios* are insufficient for fulfilling this

burden. *United States* v. *H. A. Caesar & Co.*, 32 CCPA 142, 143–44, C.A.D. 299 (1945).

In the *Kurz* case, *supra*, the court accepted the broad conclusory statements of a witness as establishing a *prima facie* showing on the issue of component material of chief value under circumstances where such component material appeared fairly obvious from the sample, the witness was in a position to know such values, and there was no cross-examination to show that the witness' statements were not based on facts. None of these elements are present here.

In conclusion, the court holds (1) that plaintiff has failed to overcome the presumption of correctness attendant upon the government's classification of the imported figures under item 737.40 as toy figures of animate objects; and (2) that plaintiff has failed to prove that the component material of chief value of the importations in question was rubber or plastics. The action is therefore dismissed and judgment will be entered accordingly.

(C.D. 4736)

BRUCE DUNCAN CO., INC. *v.* UNITED STATES

Textile materials, coated

"COATED"—MEANING

Included in the standard to be utilized in determining whether a fabric is "coated" within the meaning of TSUS item 355.65 is that set out in Headnote 2(a) of Schedule 3, Part 4, Subpart C, that the material's surface be "visibly and significantly" affected. A "coated" fabric need not be completely coated.

TARIFF TERMS—COMMON AND COMMERCIAL MEANING

Tariff terms are to be construed in accordance with their common and commercial meaning which are presumed to be the same unless otherwise proved. *Floral Arts Studio, et al.* v. *United States*, 46 CCPA 21, C.A.D. 690 (1958).

Court No. 73-8-02401

Port of Chicago

[Judgment for plaintiff.]

(Decided March 2, 1978)

Tompkins & Davidson (*Herbert T. Posner, Steven S. Weiser* and *Harvey A. Isaacs* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, trial attorney), for the defendant.

LANDIS, Judge: This action involves merchandise imported in 1971 from West Germany, into the port of Chicago, Illinois and described

on the customs invoice as "FUSIBLE INTERLINING CLOTH . . . coated with polyamide pin points."

The merchandise had been originally classified by Customs under TSUS item 326.12, as modified by Presidential Proclamation 3822, as "Woven fabrics, in chief value, but not wholly of cotton: containing (in addition to cotton) silk or man-made fibers, or both, but not containing other fibers: not fancy or figured; not bleached and not colored, at the rate of 10.49% ad valorem." However, at trial the defendant conceded the merchandise was in fact colored and without objection filed an amended answer admitting "the merchandise was in fact colored, and [stating it] should have been classified under item 328.12, TSUS, with duty assessed at the rate of 14.09 per centum ad valorem, pursuant to T.D. 68–9."

Plaintiff complains the merchandise should have been classified under item 355.65, TSUS, as modified by Presidential Proclamation and as "amended by Public Law 89–241, as woven or knit fabrics (except pile or tufted fabrics), of textile materials, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics: Of vegetable fibers, at the rate of 9% ad valorem."

Defendant argues the imported merchandise is not a coated fabric for the reason that the tariff meaning of the term "coated fabric" requires the entire surface to be covered with a continuous uninterrupted layer of coating material and that the imported merchandise is not such a fabric. However, it is my decision that plaintiff's claimed classification should be sustained.

The pertinent headnote of TSUS as appearing in Schedule 3, Part 4, Subpart C states:

> 2. For the purposes of the tariff schedules—
> (a) the term "coated or filled", as used with reference to textile fabrics and other textile articles, means that any such fabric or other article has been coated or filled (whether or not impregnated) with gums, starches, pastes, clays, plastics materials, rubber, flock, or other substances, so as to visibly and significantly affect the surface or surfaces thereof otherwise than by change in color, whether or not the color has been changed thereby;

The key words in this case are "visibly and significantly affect" and the definite weight of the record is that this standard has been met by plaintiff.

Four witnesses testified for the plaintiff and two witnesses were offered by the defendant. The evidence reveals the merchandise is a dyed and unnapped black fabric. It has been described as a fusible interlining cloth. The "35" at the end of the article style number (i.e. G503D35) reflects the addition of 35,000 points or "dots" per square foot each with an approximate diameter of 0.9

millimeters. The dots are not connected to one another but are connected with the fabric.

The reason for the dot covering is to provide "good body" and "good form" for the merchandise. The degree of covering determines the resilience of the fabric, whether the merchandise will be stiff or loose. Whether these dots form a "coating" constitutes the crux of this case.

The mechanics of applying the dots to the fabric is called a "coating printing process." The machinery utilized by the trade for the process is known as "coating fusible interlining equipment." The parties largely concur as to the nature of the process. The finished fabric is run over a heated roller. A second roller, engraved with small holes which contain a fine polyamide powder, is pressed against the first roller with the fabric in between. After the powder thus is deposited, the fabric is passed through an infrared heating. After being permitted to cool, the interlining is complete.

Plaintiff's first witness, Heinz Schneider, a much experienced official of the West German Corporation which manufactured and sold the merchandise, stated that the continuous intermittent regularly coated fabrics were developed by him and his company in 1957. He further reasoned, on the basis of the relevant headnote standard heretofore set forth (Schedule 3, Part 4, Subpart C, 2(a)) that the merchandise was "coated." As to the visibility criterion, the witness testified: "You can see [the coating material]." As to the other headnote criterion, the witness responded that the polyamide dots significantly affected the fabric because subsequent to the application, the possibility of fusing with another fabric existed. His significant testimony mentioned *supra*, together with his observations that the fabrics have been considered "coated" since their development by his company from about 1967 to 1969 and that another German company deemed the merchandise coated too, remain uncontradicted. On the whole, Mr. Schneider's testimony was persuasive.

Similarly persuasive was the testimony of the importer's second witness, Jules Borrin, an executive of a domestic manufacturer of interlinings. According to him also, the material is referred to as "coated" within the tariff definition. "The visible effect," he noted on direct examination, "is a rough hand of dots, or, deposition," and the characteristics are changed. The merchandise is "significantly affect[ed]" by the application because "you couldn't use [it] unless it was going to be used" for the specific purpose of bonding.

Plaintiff's third witness, John W. Zettler, the general manager of a domestic corporation that manufactures and sells interlinings, contributed that the imported merchandise was coated and had a raised surface with "feel." Among the factors which contributed to his conclusion that the merchandise had been significantly affected was the

consideration that the character of the cloth was changed and another dimension was added.

The fourth and final witness for the plaintiff, Dino G. Fusaro, vice-president in charge of designing and quality control of a men's clothing manufacturer, concurred that the material was "coated." He attributed his conclusion to the substrate or material, that the fabric had been coated with a chemical.

The Government countered with two witnesses, both employed by the U.S. Customs Service. The first, Richard Lutzer, was a textile analyst, an assistant chief of the Fibers Branch with only approximately six credits of instruction in dyeing and finishing; the second, George Barth, was an import specialist of all non-woven fabrics. Both witnesses, however, lacked solid credentials in the specific area of coated fabrics and consequently their testimony was of considerably less weight and credibility than that of the plaintiff's witnesses. Having seen and observed the various witnesses and having carefully considered their testimony, it is my firm conviction that plaintiff has sustained its burden of proof.

Besides the unpersuasive testimony of their two witnesses, prior judicial decisions and legislative history are proffered to persuade the Court that the Government's interpretation should prevail. However, a careful examination of the decisions cited demonstrates that they are of an early date and not pertinent to the issue at hand.*

*In *In re White Son Company*, 1 Synop. Dec. 348, T.D. 19037 (1898), the Board of General Appraisers, the predecessor of this Court, was concerned with the classification of certain bookbinders' cloth. The Board upheld classification of the merchandise under paragraph 311 of the 1897 Tariff Act as "cotton cloth, filled or coated." The decision was based on the factual finding that the coating treatment involved there "completely filled the interstices between the threads of the fabric and rendered it opaque." There was absolutely no discussion at all as to what the outcome would have been if the cloth, as at bar, was less than completely coated. The same analysis applies for *In re F. H. Shallus*, 4 Treas. Dec. 382, T.D. 22966 (1901). All that is proved by the Government's lengthy quotation from the *Shallus* opinion is that in *that* case the covering "so permeated the fiber and filled or closed the interstices between the threads of the fabric as to render it entirely opaque * * *." *Id.*, 382-83. The Court of Appeals for the Second Circuit considered the exact same statutory terminology in *United States* v. *Pinney, Casse & Lackey Co.*, 105 F. 934 (2d Cir. 1900), but the entire decision concentrated on the adjective "filled" not "coated." Whatever relevance the case has actually contradicts defendant's supposition since the Court read in the word "substantially" before "filled," not "completely."

In *Hudson Forwarding & Shipping Co.* v. *United States*, 18 CCPA 258, T.D. 44427 (1930), the issue was whether certain imitation lizard skin could be classified under paragraph 907 of the Tariff Act of 1922 as "waterproof cloth." Although the court ultimately decided that the proper classification was under the paragraph 907 provision for "filled or coated cotton cloths not specially provided for," neither the Appeals Court nor this Court (56 Treas. Dec. 669, T.D. 43750 (1929)) discussed whether the merchandise was "coated."

The last cited case, *Respro* v. *Vulcan Proofing Co.*, 1 F. Supp. 45 (E.D.N.Y. 1932), is a patent infringement case. Defendant's own emphasis of the Court's dicta, "*A coat is a layer proposition that is integrate throughout, and is not usually broken up in any way nor subdivided*" (emphasis added in the Government's brief, page 22, citing *Respro* at 48), demonstrates that reliance on the case is not helpful. If a coat is "not usually broken up in any way," obviously in some instances a coat may be interrupted. In any case, *Respro* is inapposite here.

The only case which even remotely supports the defendant is *Frank J. Markwalter & Co. et al.* v. *United States*, 65 Treas. Dec. 205, T.D. 46887 (1934), wherein was alternatively raised the question of whether certain cotton gauze bandages might be classified as "filled or coated cotton cloths not specially provided for" under paragraph 907 of the Tariff Act of 1930. While the Court did hold that the importer's claim under this paragraph was untenable, the significant factual difference between the gauze involved there and the interlining here disallows any *stare decisis* effect. The *Markwalter* Court emphasized that "the open spaces left between the threads are so pronounced and conspicuous as to give the fabric a sievelike appearance." *Id.*, 207. Such a description would be wholly inaccurate for the merchandise here. On the law, *Markwalter* does not decide that "coated" means completely coated.

There is no question but that tariff terms are to be construed in accordance with their common and commercial meaning which are presumed to be the same unless otherwise proved. *Floral Arts Studio, et al.* v. *United States*, 46 CCPA 21, C.A.D. 690 (1958); Sturm, *A Manual of Customs Law*, page 202 and cases there cited.

It is the opinion of the Court that under the testimony of record the imported merchandise falls within the term coated fabrics as set forth in the applicable headnote, and as this was the only issue to be determined, it is the Court's conclusion that the merchandise is properly classifiable, as plaintiff contends, within item 355.65, TSUS, as modified.

Judgment will be entered accordingly.

(C.D. 4737)

A. JOHNSON & CO., INC. *v.* UNITED STATES

Iron fragments

Court Nos. 70/19276, etc.

Ports of New York, Baltimore, San Francisco and Portland, Oreg.

[Judgment for plaintiff.]

(Decided on remand [C.A.D. 1196] March 10, 1978)

Busby Rivkin Sherman Levy and Rehm (*Joseph S. Kaplan* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Andrew P. Vance*, Chief, Customs Section, and *Joseph I. Liebman*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case, described as Mairon Electrolytic Iron Cathode Plate or Mairon Electrolytic Iron Flake, was heretofore the subject of decision after trial in C.D. 4650 wherein this court held the merchandise to be classifiable as claimed under TSUS item 415.50 as modified by T.D. 68–9 as chemical elements in any physical form at the duty rate of 7 or 8 *per centum ad valorem*, depending upon date of entry, and not, as returned in the liquidation, under TSUS item 657.20 as modified by T.D. 68–9 as articles of iron not coated or plated with precious metal at the duty rate of 13 or 15 *per centum ad valorem*, depending upon date of entry. An alternative claim for classification of the merchandise under TSUS item 799.00 as modified by T.D. 68–9 as any article not provided for elsewhere in the schedules at the duty rate of 7 or 8 *per centum ad valorem*, depending upon date of entry, was not reached by the court in view of its disposition of the primary claim.

On appeal the Court of Customs and Patent Appeals *reversed* this court's determination with respect to the primary claim in C.A.D.

1196, holding that the merchandise was excluded from classification under Schedule 4 of the TSUS per force of Headnote 1(iii) of that schedule, and *remanded* the case to this court for a determination of the merits of any unadjudicated claimed classification.

Inasmuch as the appellate remand was for *determination* of the unadjudicated claim rather than for *further proceedings* in the case this court is disposing of the alternative claim on the basis of the existing record which the court regards as being sufficient for such purposes, as did apparently the Court of Customs and Patent Appeals.

The court is not disposed toward entering a judgment on the existing record "in favor of the defendant" as sought by the defendant, among other things, in its communication to the court and the opposing party by letter dated December 28, 1977. While it is true as defendant states that the appellate court ruled that the original classification under item 657.20 remained presumptively correct in the light of that court's holding, this presumption must, in the court's opinion, be measured against the unadjudicated claim under item 799.00. The appellate court did not order that the original classification "should be reinstated" as defendant states. On the contrary, the appellate court remanded the case to this court for additional adjudication with respect to any "unadjudicated claimed classification".

In C.D. 4650 this court rejected classification of the imported merchandise under item 657.20 because the imported iron fragments are not *articles of iron* as they of necessity would have to be in order to be classifiable in Part 3 of Schedule 6 of the TSUS. The court found the merchandise to be iron in a primary form although not provided for in that particular form in Part 2 of Schedule 6 of the TSUS. In this court's view neither of these findings was disturbed by the holding of our appellate court in C.A.D. 1196. In this connection our appellate court simply said:

> Assuming, arguendo, that the Customs Court was correct in finding that Mairon is not an "article of iron," as that term is used in Schedule 6, Part 3, and that iron in flake form does not fall within any of the statutory descriptions in Schedule 6, Part 2, we are of the opinion that the Customs Court erred in its application of Headnote 1(iii).

And Headnote 1(iii) only deals with exclusions from classification under Schedule 4 of the TSUS—the chemicals schedule.

The court continues to believe in the soundness of its previous findings in C.D. 4650 concerning the primary nature of the imported iron fragments. Moreover, if Congress had intended to deal specifically with electrolytic iron in the TSUS there is persuasive evidence in the legislative history of the TSUS of Congress' awareness (1) of the commercial existence of electrolytic iron, and (2) of the treatment of that

material as a primary form of metal under a tariff classification system said to have been relied upon by the framers of the TSUS in the "arrangement of the proposed revised schedules".* See *Explanatory Notes to the Brussels Nomenclature* (1955), page 662, where, under the heading 73.06 dealing, among other things, with blocks, lumps and similar forms of iron or steel, it is stated, "This includes electrolytic iron produced in any form and broken into pieces and imported as such"; and compare this with the definition of "*unwrought*" contained in Headnote 3(a) of Part 2 of Schedule 6 of the TSUS wherein that term is defined as "the term '*unwrought*' refers to metal, whether or not refined, in the form of . . . blocks, lumps . . . and similar primary forms . . . ".

Thus, since the iron fragments at bar are unquestionably a primary form of iron which does not respond to the tariff concept of *articles of iron*, and cannot, under the law of this case, be classified under the chemicals schedule, it follows that this merchandise is classifiable as alternatively claimed by the plaintiff under the residual provision in item 799.00 for articles not provided for elsewhere in these schedules, and the court so holds.

Judgment will be entered herein accordingly.

(C.D. 4738)

KIMBALL SYSTEMS, INC. *v.* UNITED STATES

Plastic fasteners

Tie-line fasteners imported from the Netherlands were classified as sew-on fasteners under item 745.63 of the tariff schedules, as modified by T.D. 68–9, and assessed with duty at the rate of 27.5% ad valorem. Plaintiff protested the classification and claimed that the merchandise was properly classifiable as other plastic articles not specially provided for under item 774.60 of the tariff schedules, as modified by T.D. 68–9, at a duty rate of 8.5% ad valorem. Plaintiff's protest is denied since it was unable to overcome the statutory presumption of correctness attached to the classification.

PRESUMPTION OF CORRECTNESS

In all customs cases, plaintiff has the burden of overcoming the statutory presumption of correctness which attaches to the government's classification of imported merchandise. To overcome this presumption, the plaintiff must prove that the customs classification was wrong and that its claimed classification is correct. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F.2d 1315 (1970); *Technical Tape Corp.* v. *United States*, 55 CCPA 38, C.A.D. 931 (1968).

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*Tariff Classification Study (1960), Submitting Report, page 8.

COMMON MEANING—QUESTION OF LAW

The common meaning of a term used by Congress in the tariff schedules is a question of law to be decided by the court. *United States* v. *National Carloading Corp.*, 48 CCPA 70, C.A.D 767 (1961); *J. E. Bernard & Co., Inc.* v. *United States*, 63 Cust. Ct. 45, C.D. 3871 (1969). In ascertaining the meaning the court may use relevant lexicographic and other standard authorities, *Burrows Equipment Company* v. *United States*, 62 Cust. Ct. 681, 684, C.D. 3848, 300 F. Supp. 455, 456–57 (1969), and may accord great weight to expert testimony. *United States* v. *Scruggs-Vandervoort-Barney Dry Goods Co.* 18 CCPA 279, T.D. 44450 (1930). However, expert testimony presented by a witness whose expertise in the field is limited is deserving of little weight.

CLASP—DEFINED

As a tariff term, "clasp" refers to an item which fastens two things or parts of things together. Releasability is not an essential element.

Court No. 73-6-01546

Port of New York

[Judgment for defendant.]

(Decided March 17, 1978)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Mark K. Neville* and *Susan Handler-Menahem*, trial attorneys), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from the Netherlands. The merchandise, described as "Tie-Line" fasteners, was invoiced as two and three-eighths inch and one inch "Nylon Tie-Lines."

The merchandise was classified by the Customs Service as sew-on fasteners, under item 745.63 of the Tariff Schedules of the United States [TSUS], as modified by T.D. 68–9, and consequently was assessed with duty at 27.5% ad valorem. Plaintiff contests that classification and claims that the merchandise should be properly classified as other plastic articles not specially provided for under item 774.60, TSUS, as modified by T.D. 68–9, with a duty rate of 8.5% ad valorem.

The defendant urges that the customs classification is correct and should be sustained. In the alternative, however, defendant claims that the merchandise is dutiable under item 745.65, TSUS, as modified by T.D. 68–9, as clasps other than the articles provided for in item

745.63, TSUS, with a duty of 13.5% ad valorem. Plaintiff asserts further that if the court concludes that the merchandise is to be classified as clasps, the defendant's alternative claim under item 745.65 of the tariff schedules is the proper classification.

The pertinent provisions of Schedule 7 of the TSUS are as follows:

Classified by the Customs Service:

PART 7. – BUTTONS, BUCKLES, PINS, AND OTHER FASTENING DEVICES; * * *

Subpart A. – Buttons, Buckles, Pins, Hooks and Eyes, and Slide Fasteners

	* * * * * * *	
	Clasps, handbag and similar frames incorporating clasps, and snap fasteners; all the foregoing and parts thereof:	
	Valued not over 20 cents per dozen pieces or parts:	
745.63	Sew-on fasteners, and parts thereof	27.5% ad val.

Defendant's alternative claim:

745.65	Other	13.5% ad val.

Plaintiff's claimed classification:

PART 12. – RUBBER AND PLASTICS PRODUCTS

* * * * * * *		
	Subpart D. – Articles Not Specially Provided For of Rubber or Plastics	
	* * * * * * *	
774.60	Articles not specially provided for, of rubber or plastics:	
	* * * * * * *	
	Other	8.5% ad val.

Certain material facts are not in dispute. The parties have agreed that the merchandise consists of plastic "T" shaped tie-line fasteners which are produced in clips. These fasteners are inserted into garments, cloth or other material, by use of a special device which contains a needle with a groove running the length of the needle. It is agreed that this fastening procedure is used in lieu of hand or machine sewing to fasten labels to garments, and to pair and fasten two or more articles, such as shoes. It is also admitted that when the merchandise was first marketed by plaintiff, one of its intended uses was to replace string tags and the sewing needle procedures by which string tags were previously attached.

Although plaintiff concedes that the merchandise consists of "fasteners," it argues that they do not fall within the common meaning of the term "clasps" because the fasteners are not releasable. Plaintiff also argues that the fasteners are not bought, sold or known as clasps. Even if the fasteners are found by this court to be clasps, plaintiff asserts that they cannot be sew-on fasteners because they are sewn *into* or sewn *through* materials, and, like thread, are only the *means* of sewing on fasteners such as buttons, rather than the fasteners themselves.

In its effort to support its contentions plaintiff introduced the testimony of Mr. Walter C. Rabe, the Kimball Systems product manager during the period in question. Although he was in charge of marketing the imported tie-line fasteners with paper tags manufactured by Kimball, his expertise in the use of plastic fasteners was limited to those used in retail tagging operations only. According to Mr. Rabe, plastic fasteners and the Dennison-patented attachment gun replaced the twine string tags and sewing needle procedure for reasons of economy and security. He testified that he never heard these plastic fasteners referred to as either clasps or sew-on fasteners. Furthermore, he did not consider these fasteners to be "articles which are sewn on." Finally, Mr. Rabe noted that the fasteners are not removable, or are removable with great difficulty. On cross-examination, Mr. Rabe admitted that his expertise in sewing was limited solely to the extent that Kimball Systems products are sewn into garments.

In support of the customs classification the defendant maintains that the merchandise falls within the common meaning of the term "clasps," which requires only that it fasten or hold items or parts of items together. Releasability, the defendant contends, is irrelevant in defining a clasp. In the event the court deems releasability to be significant, the defendant indicates that the fasteners are releasable and reusable.

In the view of the defendant, the fasteners are sewn-on fasteners since sewing merely requires an interlocking which will keep the fabrics together rather than the production of a stitch. Even if a stitch were to be required, the government contends that the insertion of the fastener does in fact produce a stitch. In this sewing operation, the defendant submits that the plastic filament can be analogized to the "thread," while the "T" bar at each end forms the clasp which is attached to the article by means of a needle. If the court does not regard the described procedures as sewing, the defendant relies on its characterization of the merchandise as a clasp, and claims the alternative classification as "other" clasps.

The defendant has not merely relied upon the statutory presumption of correctness, but has introduced the testimony of four expert

witnesses in support of the customs classification. Mr. Gerard Merser, general manager of the Fastener Division of the Dennison Manufacturing Company, testified that he was in charge of the new products development that created the "Swiftach" system and fasteners. He supervised worldwide manufacturing and marketing of these fasteners and attachment guns. The "Swiftach" system he described included the patented machine used to affix the very fasteners in this case, as well as the Dennison-made fasteners identical to those in issue. As a result of the marketing and manufacturing activities of the Dennison "Swiftach" machine and fasteners, Mr. Merser was without question qualified as an expert in an industry known as the plastic sewing fastener industry. As an expert he testified that the use of the Dennison gun and plastic fasteners could be considered a sewing operation. Furthermore, although the company did not use the term "sew-on" fasteners in its advertising, the merchandise nonetheless could be regarded as "sew-on" fasteners. He also noted that the fasteners could be considered releasable.

Mr. Merser enumerated the various uses of the fasteners that he developed. These uses include:

1. sewing tags on garments;
2. sewing pleats in drapes and parts of filter bags in air conditioners and heaters;
3. suturing cadavers subsequent to autopsies and animals in veterinary practice;
4. joining or pairing items;
5. identifying fish in biological industries;
6. fastening buttons;
7. sewing linings in garments;
8. sewing linings in various aircraft.

The defendant's other witnesses fully substantiated the testimony of Mr. Merser. Mr. Paul Kirschner, general manager in charge of design and merchandise for Sharilove Fashions, stated that his company used plastic fasteners in almost 500,000 garments each year. These fasteners were used to fasten inside facings to outer portions of the garment as well as to attach tags and labels to the sleeves.

Defendant's third witness, Mr. Irwin Kahn, a professor at the Fashion Institute of Technology, and an expert in the sewing industry, testified that the process of affixing the plastic fasteners, using the Dennison machine, was a sewing operation. He explained his conclusion by defining sewing as "[t]he placing together of two materials or more, and the keeping of them in place to each other by the introduction of a third substance drawn by a needle." Mr. Kahn testified categorically that sewing only requires that a needle effectuate an interlocking of fabrics rather than a "stitch," as was asserted by the plaintiff.

Defendant's final witness was the security manager for the Abraham & Straus stores, Mr. Raymond Devine, a former New York City Police Department detective who was an expert in the field of retail security. Mr. Devine testified that the plastic fasteners used to attach tags to garments were removable by hand manipulation, and by the use of hatpins and retractable ball point pens. He also testified that the fasteners were reusable, citing as examples shoplifters, and "refund workers" who remove high-priced tickets from garments and attach them to lower-priced garments which they then return to the store for a refund.

From dictionaries published over the period from 1893 through 1976 the defendant has also presented a summary of thirteen definitions of the noun "clasp." In essence, these definitions indicate that a clasp fastens two things or parts together.

As in all customs cases, plaintiff has the burden of overcoming the statutory presumption of correctness which attaches to the government's classification pursuant to 28 U.S.C. § 2635. To overcome this presumption, the plaintiff must prove that the customs classification was wrong and that its claimed classification is correct. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *Technical Tape Corp.* v. *United States*, 55 CCPA 38, C.A.D. 931 (1968).

The question presented, therefore, may be said to be whether plaintiff has borne its burden of proving that the imported fasteners have been improperly classified as sew-on fasteners, and that they should have been lawfully classified as other plastic articles not specially provided for. Only if the court finds that the imported merchandise has been improperly classified by the customs officials will it be necessary to consider the defendant's alternative claim.

Plaintiff contends that the tie-line fasteners do not fall within the common meaning of the term "clasp" because they are not releasable and are not generally bought, sold or referred to as clasps. It is well established, however, that the common meaning of a tariff term is a question of law to be decided by the court. *United States* v. *National Carloading Corp.*, 48 CCPA 70, C.A.D. 767 (1961); *J. E. Bernard & Co., Inc.* v. *United States*, 63 Cust. Ct. 45, C.D. 3871 (1969). It is equally well established that the common meaning is "a matter of law to be determined by the court on the basis of its own understanding of what that meaning is; and * * * in reaching its conclusion * * * the court may use as an aid relevant lexicographic and other standard authorities." *Burrows Equipment Company* v. *United States*, 62 Cust. Ct. 681, 684, C.D. 3848, 300 F. Supp. 455, 456–57 (1969). See materials cited in *Borneo Sumatra Trading Co., Inc.* v. *United States*, 64 Cust. Ct. 185, 188, C.D. 3980, 311 F. Supp. 326, 329 (1970).

The court has examined the common meaning of the term "clasp," as indicated by the standard lexicographic authorities. Most sources show clearly that the primary function of a clasp is simply to fasten two parts together. For example, the *Funk & Wagnalls New Standard Dictionary of the English Language*, 1937 edition, contains a definition of the term "clasp" which was used in the earlier 1913 edition:

> "*clasp*, *n.* 1. A fastening by which things or the parts of a thing are bound or held together; also, any instrument or bond of connection, as a tendril, the hook that fastens on an eye, a grappling-iron, etc."

This definition is similar to the dictionary definitions cited to the court by the defendant. It is significant that no mention of releasability is made in any of the definitions. It is not unreasonable to assume that these definitions were considered by the Congress in employing the term "clasp" in the successive enactment of the Tariff Acts of 1909, 1913, 1922, 1930, and in the pertinent tariff schedules. Thus, despite plaintiff's arguments to the contrary, the clear lexicographic authorities indicate that releasability is not required for an article to be considered a clasp. According to most dictionaries, the only requirement is that the item fasten or join two parts or things.

In ascertaining the meaning of a term used in the tariff statutes, in addition to lexicographic definitions the court may rely upon and accord great weight to expert testimony. See *United States* v. *Scruggs-Vandervoort-Barney Dry Goods Co.*, 18 CCPA 279, T.D. 44450 (1930). Even if it were to be assumed in the present case that the lexicographic authorities were inconclusive, plaintiff has not submitted convincing expert testimony to overcome the presumption of correctness that attaches to the classification of the customs officials and the supporting evidence introduced by the defendant.

The only expert testimony presented by plaintiff was that of Mr. Walter C. Rabe, one of plaintiff's employees, whose expertise was limited exclusively to fasteners used in retail tagging operations. His recollection, that he had never heard the merchandise referred to as clasps or sew-on fasteners, is deserving of little weight in determining the common meaning of the term "clasp." Since Mr. Rabe's experience was confined to retail tagging and sewing procedures he was not qualified to testify as to the uses of these fasteners beyond retail tagging. He likewise was not qualified to testify as to their nomenclature insofar as it related to those broader applications. His limited experience and expertise seriously affect the probative value or weight to be accorded his opinion testimony. In view of these limitations, Mr. Rabe's testimony is insufficient to support plaintiff's assertion that the fasteners are sewn "in" rather than "on" the items.

This distinction was not supported, and is deemed to be without merit.

Mr. Rabe's testimony was fully refuted, if not totally negated, by the evidence presented by the defendant. The defendant's first witness, Mr. Gerard Merser, an expert in the development of the plastic fastener and attachment system, is a widely recognized expert in the entire plastic fastener industry. He is thoroughly familiar with the myriad uses of the imported merchandise, and the procedures or system by which it is attached. His testimony, that the merchandise consists of sew-on fasteners affixed by a sewing procedure, was reliable, convincing and persuasive. The same may be said for the testimony of Mr. Irwin Kahn, an expert in the sewing industry, who characterized the process of fastener affixation as a sewing procedure.

In addition to the statutory presumption of correctness attaching to defendant's classification of tie-line fasteners under item 745.63, the defendant has introduced expert testimony and lexicographic authorities. Plaintiff's assertion that these fasteners are not bought, sold or known as "clasps," and its reliance on two characteristics of its fasteners to distinguish them from "clasps" (viz., that they are sewn *in* rather than sewn *on* and are not releasable) have not overcome this statutory presumption of correctness. Rather, the court in ascertaining the common meaning of the tariff term "clasp," has concluded that releasability is not an essential element of a "clasp." In addition, the court has found plaintiff's sewn *in*-sewn *on* distinction to be unsupported by the evidence and without merit.

Since the plaintiff has not overcome the statutory presumption of correctness, and the court has concluded that the merchandise has been properly classified under the tariff schedules, it is not necessary to consider defendant's alternative claim.

In view of the foregoing, it is the determination of the court that plaintiff has not succeeded in proving that the imported merchandise has been unlawfully classified by the customs officials. Consequently, plaintiff's protest is denied, and defendant's classification of the merchandise as sew-on fasteners under item 745.63, TSUS, as modified by T.D. 68–9, with duty at the rate of 27.5% ad valorem is sustained.

Judgment will be entered accordingly.

(C.D. 4739)

C.B.S. IMPORTS CORP. *v.* UNITED STATES

Men's sport shirts

Merchandise was purchased from Japan and appraised on the basis of export value at the invoice unit values, plus 7.2 percent

which percentage represented the difference in the yen/dollar exchange rate on the dates of the orders (May and July 1971) and the actual date of exportation (December 1971). The 7.2 percent was added to reflect the upward revaluation of the yen between those dates in accordance with Bureau of Customs (now Customs Service), Region II, Information Bulletin No. 162 on the assumption that the merchandise increased in value in proportion to the decrease of the dollar vis-à-vis the yen.

The Customs Court held that the addition of the 7.2 percent to the invoice prices representing currency fluctuations between the dates of orders or contracts, and the date of exportation, was not includable as part of the export value basis of appraisement. Under the controlling statute, § 402(b) of the Tariff Act of 1930, as amended (19 U.S.C. § 1401a(b)), export value is based exclusively on the *price* of the merchandise, not on any abstract notion of value.

ADMINISTRATIVE LAW

Although administrative directives should be upheld if found to implement the will of Congress as expressed in a statute, the court, in performing its function of judicial review, cannot defer to an administrative interpretation or application of a statute if it is inconsistent with the statutory language or congressional intent.

EXPORT VALUE—INCREASES IN PRICE BETWEEN DATES OF ORDERS AND DATE OF EXPORTATION

An increase in price between the dates of orders or contracts and the date of exportation, shown through actual sales or increases in price lists, will result in an appraised value at the higher price prevailing on the date of exportation.

EXPORT VALUE—ADDITION TO INVOICE UNIT VALUES—CURRENCY FLUCTUATION

The addition of 7.2 percent to the invoice unit values solely to represent the difference in the yen/dollar exchange rate between the dates of orders and the date of exportation is not properly included as part of export value.

CUSTOMS LITIGATION—BURDEN OF PROOF

In customs law in order to prevail the plaintiff must not only prove the appraised value is erroneous, it must also establish a different value in its place.

SEPARABILITY OF APPRAISEMENT

Where an appraisement was made by adopting the invoice unit values and adding thereto a percentage reflecting currency fluctuation, the appraisement is separable.

SAME

Where an appraisement is deemed separable, and the merchandise was not sold on an ex-factory basis, the plaintiff, in order to rely on the presumption that the unchallenged portion of the appraisement represents the export value, need not show that the merchandise was freely sold or offered for sale on the same basis as sold to it.

Court No. 73-1-00020

Port of New York

[Judgment for plaintiff.]

(Decided April 4, 1978)

Siegel, Mandell & Davidson (*Brian S. Goldstein* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Bernard J. Babb*, trial attorney), for the defendant.

RE, Chief Judge: In this customs reappraisement case, the question presented pertains to the correct dutiable value of imported merchandise. The merchandise consists of men's sport shirts which were sold to plaintiff by The Tosho Co., Ltd., Osaka, Japan pursuant to purchase orders made between May and July 1971. It was exported from Japan on December 12, 1971.

The appraisement was made on the basis of export value, which is defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. § 1401a(b)), as follows:

> "(b) For the purposes of this section, the export value of imported merchandise *shall be the price, at the time of exportation* to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States." (Emphasis added.)

The appraising officer arrived at the appraised value by accepting the invoice unit values stated in U.S. dollars, as entered, and adding thereto a charge of 7.2 percent. This 7.2 percent was added to reflect the upward revaluation of the Japanese yen occurring between the dates of orders (May and July 1971), and the date of exportation (December 1971). It was added in accordance with instructions set forth in Bureau of Customs (now the Customs Service), Region II, Information Bulletin No. 162, dated January 3, 1972, entitled "Appraisement – Currency Parities."

The parties do not dispute the invoice unit prices, and only the addition of the 7.2 percent is in issue. The question presented, one of first impression, is whether this addition, representing the difference in the yen/dollar exchange rate between the dates of the orders and the date of exportation, is includable as part of the export value basis of appraisement.

A brief sketch of the international system of currency exchange rates during the period in question may be helpful in understanding the legal question presented.

By the "Bretton Woods Agreement" in 1945, each member of the International Monetary Fund, which includes the United States, agreed to a fixed rate of exchange of its currency.

Throughout the 1960's, because of the Vietnam War, changes in the world economy, and other causes, the United States balance of payments position deteriorated drastically. Furthermore, liquid capital flows were moving heavily against the United States. Speculative factors contributed to this situation as investors anticipated exchange rate appreciations by some of the countries which were heavy recipients of United States funds, such as Japan.

As a remedial measure, on August 15, 1971 President Nixon announced that the United States would temporarily suspend the convertibility of the dollar into gold or other reserve assets, and imposed a 10 percent surcharge on all imports. Pres. Proc. 4074, 3 C.F.R. 60 (1971–1975 Comp.).

The Secretary of the Treasury announced that the United States would not attempt to maintain official currency parities by buying or selling foreign currencies in the exchange markets. N.Y. Times, August 17, 1971, at 16.

Subsequently, a number of countries, Japan among them, allowed their currencies to "float" against the dollar. This situation continued until December 18, 1971 when the so-called "Smithsonian Agreement" again fixed the parity of various currencies. The dollar was thereby devalued against the yen by almost 17 percent from the April 1971 rates.

In response to these changes in currency parities, the Bureau of Customs issued instructions to increase appraised values correspondingly. These instructions are embodied in Bureau of Customs, Region II, Information Bulletin No. 162, dated January 3, 1972.[1]

Plaintiff contests the appraisement, and claims that the 7.2 percent addition is not properly part of dutiable value since it is not made in accordance with the statutory definition of export value. It is plaintiff's contention that statutory valuation is not concerned with the net amount of foreign currency ultimately received by the foreign exporter, but only the price paid by the American importer. As there is no proof of sales of "such or similar merchandise" at a price higher than that paid by plaintiff, plaintiff maintains that defendant improperly computed export value. Specifically, plaintiff contends that it is error to compute export value by estimating the dutiable value taking

[1] For a discussion of the currency exchange system and its changes during the period in issue, see Edwards, *The Currency Exchange Rate Provisions of the Proposed Amended Articles of Agreement of the International Monetary Fund*, 70 AM. J. INT'L L. 722, 723-26 (1976); S. Rep. No. 92-678, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & ADMIN. NEWS 2209.

into account any currency fluctuation between the dates of orders and the date of exportation without any basis in actual market conditions.

Defendant argues that the appraisement, although expressed in terms of unit invoice values plus 7.2 percent, represents the price that the customs officer found to be the freely offered price at which such or similar merchandise was freely sold or offered for sale to all purchasers for export to the United States. The appraising customs official is directed by statute (19 U.S.C. § 1500(a)) to ascertain or estimate the value of the entered merchandise by all reasonable "ways and means" in his power. The defendant therefore contends that, notwithstanding any statement of cost in any invoice, the method of determining value directed by the Regional Commissioner of Customs in Information Bulletin No. 162 is clearly reasonable in light of the declining value of the dollar vis-à-vis the yen between the dates of orders and the date of exportation. Relying on the statutory presumption of the correctness of the customs official's determination (28 U.S.C. § 2635(a)), defendant urges that the appraisement should be upheld as plaintiff has failed to overcome this presumption.

At the trial, plaintiff introduced three exhibits into evidence: the deposition of Mr. Vincent J. DeMaio, the import specialist who appraised the merchandise, together with four deposition exhibits including Information Bulletin No. 162; the affidavit of Mr. Ryozo Tsugeno, manager of the Textile Made-Up Goods Department of The Tosho Co., Ltd., Osaka, Japan; and Bureau of Customs, Region II, Informational Pipeline No. 21, Supplement No. 1, which provided the tables for computing the amount of the dollar/yen fluctuation during the pertinent period.

The defendant introduced the testimony of its expert witness, Dr. Joseph Brada, associate professor of economics and international business at the Graduate School of Business Administration, New York University.

In his deposition, Mr. DeMaio testified that he passed on the invoices in question, and that to his knowledge his advisory appraisement had been approved by the "appraiser." He stated that the 7.2 percent addition to the invoice values represented the difference in the yen/dollar exchange rate as of the date of the purchase order or contract as compared to the date of exportation. In determining the addition of 7.2 percent, Mr. DeMaio explained that he converted the U.S. dollar value of the merchandise into yen at the rate that prevailed on the date of the contract, and reconverted into U.S. dollars at the rate that prevailed on the date of exportation. Mr. DeMaio stated that the entry was appraised in accordance with the instructions set forth in Information Bulletin No. 162.

Information Bulletin No. 162, addressed to customs employees, customs brokers and others, was in the form of a telegram received from the Bureau of Customs. The Bulletin which was for "information and guidance," provided in pertinent part that:

> "Starting immediately, whenever the District Director is satisfied that the invoice price in dollars represents export value at the time of the contract, he shall appraise the imported merchandise in the following manner:
>
> 1. He shall convert the dollar value of the merchandise into the foreign currency at the rate which prevailed on the date of the contract, and he shall reconvert into dollars at the rate which prevailed on the date of exportation."

Region II, Informational Pipeline No. 21, Supplement No. 1, contains the rates of exchange on the dates of the purchase orders or contracts (.00279733 and .00279800) and the date of exportation (.00299950). The currency factor charts set forth therein provide the factor by which the invoice price in dollars is to be multiplied to determine the increased "value." For the dates in issue in this litigation, the factor is 1.072, which can also be expressed as 7.2 percent.

It is clear that the imported merchandise was appraised in accordance with Information Bulletin No. 162. It is equally clear that the administrative bulletin is not binding on the court. Administrative regulations and directives should be upheld if found to implement the will of Congress as expressed in the statute. As stated by Mr. Justice White in *United States* v. *Cartwright*, 411 U.S. 546, 550, 93 S. Ct. 1713 (1973): "that principle is to set the framework for judicial analysis; it does not displace it." *See Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 68 S. Ct. 695 (1948); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944).

It is the function of this court on judicial review to interpret and apply the tariff laws in light of the intent of Congress. In the performance of this function, the court cannot defer to an administrative interpretation or application of a statute if it is inconsistent with the statutory language or congressional intent. *See Social Security Board* v. *Nierotko*, 327 U.S. 358, 66 S. Ct. 637 (1946); K. C. Davis, *Administrative Law of the Seventies* § 5.03, at 147 (1976). *See also C. J. Tower & Sons* v. *United States*, 33 Cust. Ct. 14, 17, C.D. 1628 (1954) and authorities cited in *Suwannee Steamship Co.* v. *United States*, 79 Cust. Ct. 19, C.D. 4708, 435 F. Supp. 389 (1977).

The fundamental principle of supremacy of law, the crux of our constitutional government, requires that all public officials obey the mandates of the Constitution and the lawful enactments of the Congress. *See* U.S. CONST. art VI; *United States* v. *Lee*, 106 U.S. 196,

1 S. Ct. 240 (1882).[2] In cases of delegated power, an application of the principle is illustrated by the Supreme Court case of *Morrill* v. *Jones*, 106 U.S. 466, 1 S. Ct. 423 (1883) which dealt with a revenue law which provided that "[a]nimals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free [of duty], upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe." By regulation the Secretary prescribed that before a collector of the port admitted animals imported for breeding purposes free of duty he had to "be satisfied that the animals [were] of superior stock, adapted to improving the breed in the United States." The importer claimed that certain animals should have been admitted duty free because they had been "specially imported for breeding purposes." Although it was admitted that the animals were imported for breeding purposes, the collector demanded payment of duties on the ground that he was not satisfied that the animals were of "superior stock." In affirming the judgment returning to the importer the duties paid under protest, Chief Justice Waite wrote:

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary." 106 U.S. at 467.

The *Morrill* case illustrates that an administrative official must execute or fulfill the expressed statutory mandate. He may not, by regulation or directive, amend or modify a statute by "[putting] into the body of the statute a limitation which Congress did not think it necessary to prescribe." In the words of Chief Justice Waite, "the object of the Secretary could only be accomplished by an amendment of the law." *See also* statements of Mr. Justice Holmes in *Waite* v. *Macy*, 246 U.S. 606, 608–09, 38 S. Ct. 395 (1918).

Whether pursuant to regulations, bulletins or other directives, it is the judicial function to determine whether the administrative official has acted *ultra vires*, i.e., beyond the power delegated in the enabling act. *See Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 422, 62 S. Ct. 1194 (1942). *See also Picone* v. *Commissioner*

[2] In the *Lee* case, the son of General Robert E. Lee sued successfully for the recovery of property of the Lee family against the commandant of Fort Myer and the superintendent of the national cemetery at Arlington. Mr. Justice Miller proclaimed the principle of supremacy of law in the following imperishable language: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government .... Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government ...." 106 U.S. at 220.

of Licenses of New York City, 241 N.Y. 157, 162, 149 N.E. 336 (1925) in which Judge Pound of the New York Court of Appeals stated that, "[l]aws are made by the law-making power and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be."

In the present case the question presented is whether the imported merchandise was correctly appraised within the meaning of "export value" as set forth in section 402(b) of the Tariff Act of 1930, as amended. Although the cases cited by counsel in their briefs may shed some light upon the question presented, none is dispositive of the specific issue before the court.

The statutory language speaks with crystal clarity that "the export value of imported merchandise shall be the *price*, at the time of exportation to the United States." (Emphasis added.) Congress intended that "export value" be based on actual prices, as determined by sales or offers for sale, rather than on any abstract notion of "value." Export value was originally defined as the "market value or price" of the merchandise. Tariff Act of 1930, ch. 497, Title IV, § 402(d), 46 Stat. 709 (1930). When Congress amended the definition of "export value," it eliminated "market value" as an element of "export value." Customs Simplification Act of 1956, ch. 887, § 2(a), 70 Stat. 943 (1956). Now, under the controlling statute, export value is based exclusively on the *price* of the merchandise. 19 U.S.C. § 1401a(b).

It cannot be doubted, therefore, that an increase in *price* between the dates of orders or contracts, and the date of exportation will result in an appraised value at the higher price prevailing on the date of exportation. *White Lamb Finlay, Inc.* v. *United States*, 29 CCPA 199, C.A.D. 192 (1942); *Blumenthal & Co.* v. *United States*, 12 Ct. Cust. Appls. 176, T.D. 40166 (1924); *Sam Yeung Co.* v. *United States*, 52 Cust. Ct. 572, R.D. 10760 (1964). In each of these cases, however, there was sufficient proof of the increased price through actual sales on the date of exportation, or increases in the price list at the date of exportation. In the present case there is no evidence of sales or offers for sale of such or similar merchandise at a price higher than that paid by plaintiff. To the contrary, the affidavit of Mr. Ryozo Tsugeno states categorically that the merchandise was neither sold nor offered for sale for exportation to the United States at prices higher than those paid by plaintiff during the period May 19, 1971 through December 12, 1971. Mr. Tsugeno also stated that, based upon his personal inspection of the books and records kept in the ordinary course of business, plaintiff paid no additional sums to Tosho Co., Ltd. for the merchandise "by reason of revaluation of currency or for any other reason."

Information Bulletin No. 162 predicates the increase in value for appraisement purposes solely on the changes in currency parites. It directs that "[the District Director of Customs] shall require the deposit of estimated duties which fully reflect the increase in value which the currency fluctuations would normally cause to occur."

Defendant's expert witness, Dr. Joseph Brada, on direct examination was asked whether the prices for merchandise ordered in the period May–July 1971 from a Japanese exporter, and invoiced in U.S. dollars, would be higher than merchandise sold in December of 1971, the date of exportation. In response, he stated that:

> "The price would be higher in order to get the same purchasing power . . . . The presumption one makes in international trade is that the . . . exporter . . . is ultimately interested in how much he's getting in terms of domestic currency because his payments to his workers, to his suppliers, and to his creditors have to be made in the domestic currency . . . . It would have taken more dollars to buy the same number of yen that the exporter had to pay to the workers and everybody else, so I would say yes, it would take more dollars."

Under the statutory formula or definition, however, the amount received by the foreign exporter for his goods in terms of his own domestic currency is not the controlling factor. The statute does not provide for the assessment of duty in this manner. The statute speaks of "price" and, in the language of this court in *Ernesto Solari et al.* v. *United States*, 5 Cust. Ct. 449, 456, R.D. 4943 (1940): "the law makes offers [for sale] the criterion in determining value. Congress did not consider any sums that a foreign exporter received for his goods as having any bearing on the lawful entered value of imported merchandise." *See United States* v. *Fisher Scientific Co.*, 26 CCPA 278, C.A.D. 27 (1938).

In the *Ernesto Solari* case, the Italian government forbade exports from the United States to be imported to Italy until an equal value of Italian exports had been sold to the United States. Italian exporters were selling the dollars received from American importers to Italian importers desirous of importing American goods at a premium above the usual exchange rate. The court held that such additional sums were not to be considered part of dutiable value. This result was justified because the class of goods imported into the United States was available to all American importers at the same price, even if that price was lower than before the Italian government's restriction on imports from the United States. What the Italians did with the dollars once they received them was irrelevant in determining proper dutiable value.

It is true that Tosho Co., Ltd. received fewer yen for the same number of dollars on the date of exportation than it would have

received had the currency exchange occurred on the dates of the purchase orders. But the change in the currency exchange rates does not automatically mean a corresponding rise in prices. Defendant's own witness, Dr. Brada, testified on cross-examination that many economic factors other than currency fluctuations could affect the price of merchandise such as that in issue here. These factors might include the level of prices in the two countries, general economic conditions, conditions in the particular industry, competition, and the nature of the merchandise itself, such as whether it was seasonal.

The Bulletin presumes that currency fluctuations or revaluations automatically increase prices, and places the burden upon the importer to show that the value of the merchandise did not rise correspondingly with the increase in value of the foreign currency. Presumably, some or all of the various factors listed by Dr. Brada could be used by the importer to show that there was no actual rise in value of its merchandise. But, it is precisely these factors that must be taken into consideration by the customs officials in determining export value.

It is clear that the defendant has only performed a mathematical computation on the invoice unit values of the merchandise to determine export value. Mr. Tsugeno in his affidavit states:

> "Based upon my knowledge of the instant merchandise and that offered by other manufacturers in Japan for exportation to the United States, I can personally state that no commercially interchangeable merchandise with that involved herein was sold or offered for sale for exportation to the United States during the pertinent period in question;
>
> * * * * * * *
>
> During the period between May 19, 1971 and December 12, 1971 there were no intervening sales or offers for sale for this merchandise by reason of the fact that the merchandise in question is seasonal in nature."

The appraising officer, of course, is not limited to the information contained in the invoices, but may use all reasonable ways and means in ascertaining or estimating value. 19 U.S.C. § 1500; *Concord Electronics Corp* v. *United States*, 69 Cust. Ct. 241, 244, A.R.D. 304, 345 F. Supp. 1000, *appeal dismissed*, 60 CCPA 185 (1972). The estimation, however, must be based on the pertinent facts available at the time. The defendant's determination of value appears to be based more on theory than on actual facts having evidentiary value. A mathematical computation is not evidence of sales or offers for sale in the country of exportation. Under the statutory language, export value cannot be ascertained or estimated in this manner. *See United States* v. *Alatary Mica Co.*, 19 CCPA 30, 34, T.D. 44871 (1931).

Apparently believing that it is supportive of its position, the defendant cites *Calif-Asia Co.* v. *United States*, 17 Cust. Ct. 461, R.D. 6582 (1946) as "a situation where the Court sanctioned the use of currency revaluation in determining the freely offered price at the time of exportation." That case was decided on its particular facts, and can have but little precedential value. It may be noted, however, that it was decided pursuant to a customs regulation that required currency conversion for the purpose of comparing values in determining the proper statutory value. The *Calif-Asia* case did not "sanction" the addition of a percentage to invoice unit values solely to represent the difference in currency exchange rates between the date of order and the date of exportation.

The statute requires that export value be determined by the *price* at which such or similar merchandise is *sold, or in the absence of sales, offered for sale* for exportation to the United States. Defendant's method of appraisement was not permitted by the explicit language of the statute. It is, therefore, the determination of the court that the 7.2 percent addition to invoice unit values is not properly part of export value.

In customs litigation, however, it is firmly settled that the plaintiff must not only prove that the appraised value is erroneous, but also establish a different value in its place. *Arditi* v. *United States*, 50 CCPA 49, C.A.D. 818 (1963); *Kenneth Kittleson* v. *United States*, 40 CCPA 85, C.A.D. 502 (1952).

To establish a value different from the appraised value, plaintiff relies on the judicially established doctrine of separability. Under this doctrine, a party to a reappraisement decision may challenge one or more of the elements entering into an appraisement while relying upon the presumption of correctness of the appraiser's return as to all other elements. *United States* v. *H. M. Young Associates*, 62 CCPA 20, C.A.D. 1138, 505 F.2d 721 (1974); *United States* v. *Fritzsche Bros.*, 35 CCPA 60, C.A.D. 371 (1947); *Haddad & Sons* v. *United States*, 54 Cust. Ct. 600, R.D. 10942 (1965), *aff'd*, 56 Cust. Ct. 792, A.R.D. 205 (1966); *United States* v. *Dan Brechner et al.*, 38 Cust. Ct. 719, A.R.D. 71 (1957). Thus, by relying on the separability doctrine, a plaintiff avoids the burden of proving each and every element of the claimed values when those elements are not contested. To take advantage of separability, the appraisement must be at the invoiced "first cost" or *per se* price, plus various charges, and not at a unitary price in which the appraisement is expressed as a single indivisible unit. *See Concord Electronics Corp.* v. *United States*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000, *appeal dismissed*, 60 CCPA 185 (1972), and cases cited therein.

Defendant claims the appraisement at issue is not separable as it expresses the price found by the Regional Commissioner to represent

the freely offered prices at the time of exportation, and not a mere addition to invoice values for some charge that he believed to be included in the price of the merchandise.

Additions to invoice prices to reflect claimed increases in value, however, have been held to be separable charges. For example, in *United States* v. *Fritzsche Bros.*, 35 CCPA 60, C.A.D. 371 (1947) the Court of Customs and Patent Appeals held as a separable charge the addition of 8.4 percent to the invoice values to reflect a claimed increase in the per ounce value of the merchandise due to evaporation or shrinkage in transit.

Application of the separability doctrine is appropriate not only on the authority of the *Fritzsche Bros.* case, but also on the basis of the purpose of the doctrine. It is the essence of the doctrine that in a reappraisement case, the plaintiff who has the burden of establishing each and every disputed element of value need not prove that which is not in issue. It was formulated to reduce trial time, and limit effort to those issues actually in dispute. As stated by the Court of Customs and Patent Appeals in *United States* v. *H. M. Young Associates*, 62 CCPA 20, 23, C.A.D. 1138 (1974): "Absent the separability rule, the courts, the government, and importers would all undergo an anomalous process in which plaintiff would undertake to prove the correctness of unchallenged actions of defendant, while defendant, presumably, would abandon the presumption of correctness and attempt to prove its own unchallenged actions incorrect." This procedure, the court observed, would be "manifestly unfair, not only to the importer, but also to the courts and to the society, which must be taxed to pay for a portion of every litigious process in which the government participates." *See also United States* v. *Gehrig, Hoban & Co.*, 56 Cust. Ct. 782, A.R.D. 204 (1966), *aff'd*, 54 CCPA 129, C.A.D. 924 (1967).

The question before the court pertains to dutiable value. Clearly, therefore, the only issue to be resolved is the correctness of the addition of 7.2 percent to the invoice prices, representing currency fluctuations between the dates of orders or contracts and the date of exportation. To require the plaintiff to prove all the elements of export value, which are not in dispute, would be unfair to plaintiff, and wasteful of time and effort.

Defendant claims that even if the appraisements are separable, as they have been found to be, plaintiff still cannot prevail. Relying on *United States* v. *Pan American Import Corp.*, 57 CCPA 134, C.A.D. 993, 428 F.2d 848 (1970), defendant contends that in order to rely on the presumption that the unchallenged portion of the appraisement represents the export value, plaintiff must show that the merchandise was freely sold or offered for sale on the same basis as sold to it. The requirement in *Pan American* that plaintiff show the mer-

chandise was freely sold or offered for sale before it could rely on the presumption of correctness of the government's appraisement has recently been expressly overruled by the Court of Customs and Patent Appeals in *United States* v. *Imperial Products, Inc.*, 65 CCPA 38, C.A.D. 1203 (Feb. 9, 1978):

> "[W]e conclude that *Pan American* was wrongly decided, and now expressly overrule it. A viable *Pan American* would reduce the presumption of the appraiser's valuation to the correctness of the money figure itself and would require an importer to prove the elements of 19 USC 1401a(b) though he challenges only a single added-on item." C.A.D. 1203, slip opinion at 11.

The court held that the separability doctrine operates to relieve the plaintiff from any requirement to prove undisputed elements of export value.

In the present case, the 7.2 percent addition, a single added-on item, is the only item being challenged. The correctness of this additional item does not depend upon the plaintiff showing any of the elements of export value. Plaintiff, therefore, may rely on the correctness of the undisputed portions of the appraisement through the operation of the separability doctrine.

The only dispute before this court relates to the 7.2 percent addition to the invoice prices. The appraiser clearly considered the *per se* price of the merchandise to be the invoice unit values, and, in accordance with Bulletin No. 162, made the 7.2 percent addition to reflect the assumption that the merchandise increased in value in proportion to the decrease of the dollar vis-à-vis the yen. This addition is not permitted by the language of the statute. The statute requires that export value be determined by the price at which such or similar merchandise is offered for sale or sold for exportation to the United States. The appraisement of the merchandise in issue is therefore erroneous. Through the operation of the separability doctrine, the plaintiff has fully met its burden of establishing a different value for the merchandise.

In view of the foregoing, and on the record before it, the court makes the following findings of fact and conclusions of law:

Findings of fact:

1. The merchandise consists of men's sport shirts exported from Japan by The Tosho Co., Ltd., Osaka, on December 12, 1971.

2. The merchandise was sold to C.B.S. Imports by The Tosho Co., Ltd. on May 19, 1971, July 15, 1971 and July 22, 1971.

3. The merchandise does not appear on the final list of the Secretary of the Treasury, T.D. 54521.

4. The merchandise was appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

5. Plaintiff accepts export value, the basis of appraisement, as correct, but disputes the addition of 7.2 percent to the invoice unit values representing differences in the yen/dollar exchange rate between the dates of orders and the date of exportation.

Conclusions of law:

1. That export value, as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, is the proper basis for appraisement of this merchandise.
2. That under the separability doctrine, plaintiff's burden of proof is limited to showing that the 7.2 percent addition is not includable in export value.
3. That the addition of 7.2 percent for currency fluctuation is not includable in export value.
4. That the presumption of correctness attaching to the customs officer's determination of value for the merchandise in question has been overcome.
5. That the invoice unit values are the export values of the merchandise.

Judgment will issue accordingly.

(C.D. 4740)

AMERIMEX CORPORATION *v.* UNITED STATES

Cotton yarn

EXPORT VALUE—INLAND FREIGHT CHARGES

Cotton yarn of various sizes imported from Mexico was appraised on the basis of export value pursuant to section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. The parties are in accord on the basis of value but disagree as to whether or not inland freight charges were properly included as part of the dutiable value of the imported merchandise.

Since the record is devoid of any evidence having probative value in support of its position, plaintiff has failed to meet its burden of proof. *Held*, accordingly, the proper values are the appraised values.

Court Nos. R69/1527, etc.

Port of Wilmington, N.C.

[Judgment for defendant.]

(Decided May 4, 1978)

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston (*Mark R. Bernstein* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

RE, Chief Judge: The question presented in these seven cases, consolidated for purposes of trial, pertains to the correct dutiable value of certain merchandise imported by plaintiff from Mexico from 1965 to 1969. The merchandise, consisting of cotton yarn of various sizes, was appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. § 1401a(b)).

Both parties agree that export value, as provided in the statutory definition, is the proper basis for appraisement. The merchandise, exported by seventeen different companies, is the subject of 281 entries, 73 of which were subject to a *per se* appraisement.

The entry papers show that the appraising officer appraised the remaining 208 entries at the invoiced unit values "plus item marked 'X', less 1.5¢ per gross lbs. net pkd." The item marked "X" varied by entry, and was either designated "freight and expenses," "frt.," "shipping," "charges and freights," "custom expenses and freight," "other expenses," or "expenses per pound."* It is agreed that these items represented inland freight charges.

No question is raised as to the invoiced unit values. The principal question presented is whether the inland freight charges were properly included as part of the export value of the imported yarn.

The parties agree on the dates of notices of appraisement and the receipt of appeals for reappraisement. Although there is a question on the dates of notice and receipt of appeal for reappraisement in Court No. R69/1527, the defendant has raised no issue as to its timeliness. From an examination of the pleadings, the court has concluded that these appeals are timely.

At the trial, plaintiff abandoned its appeals as to the 73 entries that showed a *per se* appraisement. Consequently, they are severed and dismissed.

Export value is defined in section 402(b) of the Tariff Act of 1930, as amended, as follows:

> "(b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other ex-

*Some entries set forth "F.O.B." Puebla prices; others read "Price F.O.B. Mexico," "F.O.B. Warehouse Hilados la Esperanza, S.A."

penses incidental to placing the merchandise in condition, packed ready for shipment to the United States."

By this action, plaintiff seeks to have the merchandise reappraised at the invoiced unit values. It contends that "export value" should not include the cost of freight from the plant, where the yarn was manufactured and sold to plaintiff, to Laredo, Texas, since on the dates in question, the imported cotton yarn was available to the plaintiff and other importers on an f.o.b. factory basis. Hence, plaintiff asserts that the "Laredo Freight" was not a part of either the statutory cost of production, or the export value of the imported merchandise. It relies on *Pacific Wood Products Company (James G. Wiley Co.)* v. *United States*, 59 Cust. Ct. 688, R.D. 11369, 277 F. Supp. 122 (1967); *Standard Brands Paint Co., Inc.* v. *United States*, 62 Cust. Ct. 808, R.D. 11628, 295 F. Supp. 1096 (1969); and *Hub Floral Manufacturing Company* v. *United States*, 62 Cust. Ct. 979, A.R.D. 249, 296 F. Supp. 355 (1969), *aff'd*, 57 CCPA 134, C.A.D. 993, 428 F.2d 848 (1970).

At the trial, Mr. Sanford Rosenthal, plaintiff's vice president and treasurer, was its sole witness. In support of its position, plaintiff endeavored to establish that, in each instance, it negotiated the price of cotton yarn with Mexican mills at an f.o.b. factory price; that the mills sold yarn to all purchasers at f.o.b. factory prices; and that the mills never conditioned the sale on the purchaser buying at f.o.b. Laredo prices.

Plaintiff offered into evidence the affidavit of Mr. Ernesto Chedraui, the general director of Textiles Agua Azul, S.A., one of the seventeen exporters of the imported merchandise Defendant objected on the grounds that there was evidence that Mr. Chedraui was reasonably available to testify at the trial; that service of his "affidavit" one week before the trial was contrary to the language and intent of 28 U.S.C. § 2635(b), and Rule 9.6 of the Customs Court; and that the affidavit was not an affidavit within the purview of the hearsay exception set forth in section 2635(b) since it was notarized by a notary of a foreign country without consular certification or dual notarization. At the request of plaintiff's counsel, the court granted time to obtain consular certification or dual notarization, and reserved ruling on the admissibility of Mr. Ernesto Chedraui's affidavit.

Plaintiff's counsel subsequently advised the court by letter that plaintiff had diligently attempted to have Mr. Chedraui submit a new affidavit, but was unsuccessful since Mr. Chedraui was reluctant to become involved in this litigation. Plaintiff thereupon resubmitted the affidavit proffered at the trial. Counsel also submitted the affidavit of Mr. Antonio Chedraui, who held the same position with Textiles Agua Azul, S.A., as did Mr. Ernesto Chedraui.

Defendant has objected to the introduction of Mr. Antonio Chedraui's affidavit on the ground that it was offered after the case had been tried and submitted for decision. In support of its position defendant cites Rules 9.6 (a) and (b) and Rule 10.4 of the Rules of the United States Customs Court. Indicating that plaintiff had 6½ months to have the affidavit properly executed, the defendant renews its objection to the introduction of the affidavit of Mr. Ernesto Chedraui.

The threshold question presented pertains to the admissibility of the two affidavits proffered by plaintiff. In customs litigation in which the value of imported merchandise is in issue, the pertinent statute provides that, in addition to other admissible evidence, affidavits of persons "whose attendance cannot reasonably be had, may be admitted in evidence when served upon the opposing party in accordance with the rules of the court." 28 U.S.C. § 2635(b)(1). *See also* Rule 9.6(a), Rules of the United States Customs Court.

Rule 9.6(b) prescribes the manner of service:

> "(b) *Service:* A copy of any report, deposition or affidavit described in paragraph (a) of this rule which is intended to be offered in evidence shall be served on the opposing party with the notice of trial. A party other than the party serving the notice of trial shall serve a copy of any such report, deposition or affidavit which he intends to offer in evidence upon the opposing party within 15 days after service of the notice of trial. Timely service of copies of such documents may be waived or the time extended upon consent, or by order of the court for good cause shown."

Consequently, in customs valuation cases, affidavits of persons whose attendance cannot reasonably be had are admissible into evidence. However, when timely objection is made, on the ground that the affiants could reasonably have attended the trial, the objection should be sustained. *See United States* v. *Rodier, Inc.*, 23 CCPA 336, T.D. 48196 (1936); *United States* v. *Hensel, Bruckmann & Lorbacher, Inc.*, 2 Cust. Ct. 846, R.D. 5423 (1939), *decided on remand*, 4 Cust. Ct. 630, R.D. 4728 (1940), *aff'd*, 6 Cust. Ct. 832, R.D. 5161 (1941), *United States* v. *Clayton Chemical & Packaging Company*, 52 CCPA 111, C.A.D. 867, 357 F. 2d 1009 (1965), *remanded* 383 U.S. 821, 86 S. Ct. 1128 (1966) for the purpose of enabling the importer to fill the evidentiary void by presenting other types of proof available to it.

Subsection (b) of 28 U.S.C. §2635, as amended, is derived from former section 2633 of title 28. In the *Clayton Chemical & Packaging Company* case, the Court of Customs and Patent Appeals discussed the prior section which had been broadened to embrace persons "whose attendance cannot be reasonably had" irrespective of their residence. The court stated that whether attendance may reasonably be had is a factual question to be determined by the court, and reaffirmed the

reasoning of *United States* v. *Hensel, Bruckmann & Lorbacher, Inc.*, 2 Cust. Ct. 846, R.D. 4523 (1939). The appellate court quoted the following statement of the Customs Court:

> "The language [28 U.S.C. § 2633] is plain that affidavits may be admitted of persons whose attendance cannot reasonably be had. It is our opinion that, when timely objection is made to the admissibility thereof upon the ground that the attendance of the affiants might be had in court, such objection should be sustained unless and until a proper showing is made upon the part of the party offering the affidavits that the attendance at the trial of the persons executing the same cannot reasonably be had. In the event of such a showing being offered or made, it is for the court to determine whether they are to be admitted or excluded.
>
> Here timely objection was taken to the admission of the affidavits upon said grounds and no offer or showing was made that attendance could not reasonably be had. Under such conditions the trial court should have excluded the affidavits." 52 CCPA at 119.

Plaintiff failed to serve a copy of Mr. Ernesto Chedraui's affidavit either with its original notice of trial of November 4, 1974, or the subsequent notice of trial served by mail on October 31, 1975. One week before trial, on December 23, 1975, plaintiff filed a motion to allow it to offer into evidence Mr. Ernesto Chedraui's affidavit, which had been prepared after the last notice of trial had been served and filed. It was only at that time that the defendant received the affidavit that plaintiff sought to introduce into evidence.

On *voir dire*, Mr. Rosenthal testified that, during his trips to Mexico, Mr. Ernesto Chedraui previously declined to submit an affidavit in this case. It was only a few months before trial that Mr. Rosenthal was advised that Mr. Ernesto Chedraui was willing to execute an affidavit. The record shows that the affiant, Mr. Ernesto Chedraui, had been in Mr. Rosenthal's offices in Charlotte, North Carolina, two to three weeks prior to trial. No subpoena was served upon Mr. Chedraui.

Mr. Ernesto Chedraui is general director of one of the plaintiff's suppliers, and although he was reluctant to provide an affidavit, he could have been subpoenaed when he was in Charlotte. The explanation given by Mr. Rosenthal, as well as the explanation set forth in plaintiff's moving papers, are insufficient to deprive the defendant of its right of confrontation and cross-examination of plaintiff's witness. On the facts presented the court finds that neither the provisions of 28 U.S.C. § 2635(b) nor those of the applicable rule have been met. Accordingly, the defendant's objection to the introduction of the affidavit of Mr. Ernesto Chedraui is sustained.

Mr. Antonio Chedraui's affidavit was mailed to the court on June 15, 1976, about 5½ months after this case was tried and submitted. It was executed on May 12, 1976 before Notary Public Janice Dale Goins, and bears a notary seal of Mecklenburg County, North Carolina. Neither plaintiff's attorney nor Mr. Antonio Chedraui in his affidavit offers any explanation why Mr. Chedraui could not reasonably have attended the trial. Clearly the affidavit was not served in accordance with Rule 9.6(b). Since it does not meet the requirements of the pertinent statute and rule of this court, it is inadmissible, and the defendant's objection is sustained.

No witnesses were called on behalf of the defendant. Defendant's case rests on exhibits B and C, collective exhibit D, and the statutory presumption of correctness that attaches to the appraisement. 28 U.S.C. § 2635(a).

Exhibit B is a copy of an irrevocable letter of credit for plaintiff's account, dated January 31, 1966, from the North Carolina National Bank to Lonas el Leon, S.A., Puebla, Mexico. It is illustrative of letters of credit issued to the various exporters by plaintiff before the imported merchandise could be shipped to the United States. The letter of credit included a price or amount that was 100% of the invoice value of the merchandise covered by entry No. 847–E, less customs duties. Exhibit C is a letter dated March 11, 1966 from plaintiff to U.S. Customs. It is attached to the special customs invoice for entry No. 761–E, and deals with the price plaintiff paid the exporter/seller of the merchandise, and the terms of sale. It is illustrative of the type of information Mr. Rosenthal supplied the customs officials for the imported merchandise. Collective exhibit D consists of 16 other letters to U.S. Customs, signed by Mr. Rosenthal and submitted with entry papers, which are illustrative of the manner in which plaintiff described the purchases of the imported merchandise.

Plaintiff relies on the judicially established principle that, for appraisement purposes, inland freight charges are part of dutiable value if the merchandise can only be purchased in the principal markets of the exporting country for exportation to the United States at prices which include those charges. Conversely, if it can be shown that the merchandise was freely offered for exportation in the principal markets at prices which excluded inland freight charges, they are not part of dutiable value. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958), citing *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 533 (1954) *cert. denied*, 348 U.S. 823, 75 S. Ct. 37 (1954). Hence, plaintiff has attempted to establish that, in each instance, it negotiated the price of the merchandise at an f.o.b. factory price; that the Mexican mills sold yarn to all purchasers at f.o.b. factory prices; and that it never conditioned the sale on the pur-

chaser buying f.o.b. Laredo prices. It submits that the law is clear that the "export value" of the imported merchandise does not include inland freight charges.

Mr. Sanford Rosenthal testified for the plaintiff to the following effect: During the period 1965–1969 plaintiff was primarily engaged in importing cotton yarn from Mexico, and during those years he negotiated for 2 to 2½ million pounds of yarn from Mexico. He had negotiated for the purchase of the imported yarn for plaintiff in Mexico, and had dealt with approximately 20 mills in Mexico that exported yarn to the United States. The price paid by plaintiff for the yarn was based on f.o.b. factory, Puebla, and did not include inland freight from the factory to Laredo, Texas.

Mr. Rosenthal stated that he was personally aware of the prices that the Mexican manufacturers were charging other American importers as well as plaintiff during this period, as he had seen the competitors' invoices, and had visited and conversed with them. He said that during the pertinent period negotiations made by him with Agua Azul were made on the basis of net f.o.b. factory. In each instance the price was determined as to the base net price, i.e., net f.o.b. factory, and freight to Charlotte, North Carolina, was added for mutually agreed upon conveniences. During the period in which Mr. Rosenthal was negotiating with the Mexicans, and doing business in Mexico, he said no Mexican yarn exporter required that he purchase yarn on the basis of f.o.b. Laredo as a condition of doing business. No Mexican yarn exporter ever informed or advised him that American yarn importers could only purchase yarn in Mexico on the basis of f.o.b. Laredo.

On cross-examination, Mr. Rosenthal conceded that an f.o.b. factory price, with charges to the destination could be considered a c.i.f. (i.e., cost, insurance, freight) sale. He stated that when the price for the merchandise and other terms of sale were agreed upon, he would send Agua Azul an irrevocable letter of credit for the full amount on the invoice less customs duties. The invoice did not include an amount for freight from Agua Azul's mill to the Nuevo Laredo border; freight was to be prepaid to Charlotte. Each and every invoice in this case included an amount for freight from the Mexican mills to Charlotte. Mr. Rosenthal testified that he sent irrevocable letters of credit to the Mexican mills, as illustrated by defendant's exhibit B, before the merchandise could be shipped to the United States. They included a price or amount that was 100% of the invoice value of the merchandise shipped to him less customs duties.

Mr. Rosenthal's company obtained physical possession of the merchandise at Charlotte. As to its transportation, he testified that the various Mexican mills hired the carrier that transferred the

merchandise from the factories to the Nuevo Laredo border; that Mexican sellers prepaid all of the documents necessary for shipment to that point under an agreement with plaintiff; and that Mexican exporters hired a customhouse broker, J. O. Alvarez, to take care of the transit from Nuevo Laredo to Charlotte. The merchandise shipped by Agua Azul was insured against any loss or theft occurring before it reached the Nuevo Laredo border. Plaintiff hired the insurance company that covered the shipment. Shipments from the Mexican mills to Charlotte were cost and freight shipments.

Exhibit C was read into evidence:

> "Attached to Special Customs Invoice to explain difference in total dollar import value.
>
> This is to advise that the price per pound of 28/1 carded cotton yarn of 54¢ per pound has been inflated for purpose of a subsidy received by the producing mill. *Our purchase price is to include freight prepaid to Laredo, Texas.* The mill has added to this price to reflect freight paid to Charlotte, N.C. from Laredo, Texas of 1½¢ per pound and the U.S. Customs duties of 5½¢ per pound.
>
> We are paying the Customs Duties ourselves and the Letters of Credits we issue to the mills reflects this. They must deduct this amount from the draft before payment will be made.
>
> Accordingly we have figured duties based on 47¢ per pound at 10.8% ad valorem." (Emphasis added.)

Other similar letters had been sent to U.S. Customs (collective exhibit D), and counsel stipulated that "they were all signed by the client and submitted with the entry papers."

Mr. Rosenthal testified that invoices to other American importers that he had seen were, to the best of his knowledge, "F.O.B. the mill." His recollection, however, was hazy. He named the merchandise as cotton, but could not tell the ply of the yarn, the yarn number, the name of the importer, the date of invoice, or the shipment destination.

On redirect examination, Mr. Rosenthal testified further as follows: that freight and tariff added to the invoices were at the request of the Mexican producer; that the Mexicans did not condition the sale of yarn to include the cost of freight and tariff to Charlotte; that the sale was consummated on the basis of "F.O.B. the factory" price; and that the means of transportation chosen by the mill was at his request. Counsel for plaintiff pointed out that there was only one railroad in Mexico.

The question presented is whether the inland freight charges, i.e., the costs incurred in transporting the imported merchandise from the factory to the port of export, are part of its dutiable value.

In accordance with the statutory definition, export value is the price at which the merchandise is freely sold or offered for sale in the

principal markets of the country of exportation, plus, when not included, the cost of packing and other expenses incidental to making it ready for shipment. Charges accruing subsequently, such as the cost of inland freight, are not part of the merchandise *per se*, and are not ordinarily part of export value. The court must, therefore, ascertain whether the merchandise was ever sold or offered for sale at prices which did not embrace those charges.

The basis for determining whether inland charges are a part of export value of imported merchandise was discussed at length by this court in *Hub Floral Manufacturing Company* v. *United States*, 62 Cust. Ct. 979, A.R.D. 249, 296 F. Supp. 355 (1969), *aff'd*, 57 CCPA 134, C.A.D. 993, 428 F.2d 848 (1970):

> "The rule for determining whether or not inland charges are a part of the export value of imported merchandise derives from the holding in the cases of *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553; *Albert Mottola, etc.* v. *United States*, 46 CCPA 17, C.A.D. 689, that such value includes the charges, if the merchandise is *never* offered for sale or sold at any price exclusive of the charges. Where, however, the merchandise is offered for sale or sold on an ex-factory basis, the factory being the principal market, at a price which does not include the charges, they are not to be considered a part of the statutory value of the merchandise. *United States* v. *Lyons*, 13 Ct. Cust. Appls. 639, T.D. 41484. Since the statutory definition of export value is framed to reach a price in the principal market of the country of exportation of "merchandise in condition, packed ready for shipment to the United States," it is clear that it does not ordinarily contemplate the inclusion of charges incurred subsequent to that time and place, and the *Straub* and *Mottola* cases, *supra*, are predicated upon the exceptional showing that the only price in the principal market is the one which includes the charges. For the reason that such charges are said to be inextricably bound up with the cost of the merchandise and incapable of separation therefrom, they form an integral part of the unit value of the merchandise. But especially since such transactions with the inevitable consequence of inseparability represent the exception rather than the rule, the courts are disposed to adopt a lenient view toward the quantum of proof requisite to establish exfactory sales exclusive of disputed charges. *United States* v. *Dan Brechner & Co.*, 38 Cust. Ct. 719, A.R.D. 71, affirming *Dan Brechner & Co.*, v. *United States*, 36 Cust. Ct. 612 Reap. Dec. 8599; *United States* v. *Supreme Merchandise Company*, 48 Cust. Ct. 714, A.R.D. 145; *United States* v. *Gitkin Co., supra, United States* v. *Bud Berman Sportswear, Inc., surpa*; *United States* v. *Chadwick-Miller Importers, Inc., et al., supra.*" (Emphasis in original.) 62 Cust. Ct. at 984–85.

In the case at bar, the defendant has conceded that the appraisements are separable. Accordingly, plaintiff may challenge the charges based upon inland freight, and still rely upon the presumption of correct-

ness of the appraiser's valuation for the unchallenged items. *United States* v. *Imperial Products, Inc.*, 65 CCPA 38, C.A.D. 1203, 570 F.2d 337 (1978); *United States* v. *H. M. Young Associates, Inc.*, 62 CCPA 20, C.A.D. 1138, 505 F.2d 721 (1974); *Standard Brands Paint Co., Inc.* v. *United States*, 62 Cust. Ct. 808, R.D. 11628, 295 F. Supp. 1096 (1969).

It was incumbent upon plaintiff to establish that its merchandise was sold or freely offered for sale *to all purchasers* at the "ex-factory" price exclusive of the disputed inland freight charges. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958).

The record, however, only establishes the manner in which plaintiff purchased the subject yarn. Mr. Rosenthal testified that plaintiff purchased the importations at f.o.b. factory prices, which did not include inland freight charges from the factory to Laredo, Texas; that duties and freight charges, prepaid to Charlotte, North Carolina, were added as a convenience to both parties. Letters from plaintiff to U.S. Customs, however, specifically state: "Our purchase price is to include freight prepaid to Laredo, Texas." (Exhibits C and D.)

There is no evidence in the record of actual sales, or of offers of sales, of "such or similar merchandise" at the invoice prices exclusive of the disputed inland freight charges. Mr. Rosenthal testified that no Mexican yarn exporter at any time informed him or advised him that American yarn importers could only purchase yarn in Mexico on the basis of f.o.b. Laredo. Although he said that he had seen invoices to other American importers which were "F.O.B. the mill," he could not be specific or give any details. Furthermore, other than Textiles Agua Azul, S.A., he offered no evidence with respect to the seventeen exporters to establish that they sold or freely offered for sale such or similar merchandise to *all* purchasers in accordance with the statutory provisions for export value. Apart from the attempt to introduce the inadmissible affidavits of two directors of Textiles Agua Azul, S.A., the record is devoid of any evidence having probative value in support of plaintiff's position.

In customs reappraisement cases, it is too well established to require citation of authorities that, to prevail, the plaintiff must bear its burden of proof. Plaintiff must overcome the statutory presumption of correctness attaching to the value found by the appraiser, and must establish the correct dutiable value of the merchandise. In this case, plaintiff has not met its burden of proof.

Since plaintiff has failed to meet its burden of proof in rebutting the presumptively valid appraisements, the appraised values are affirmed, and these appeals for reappraisement are dismissed.

Judgment will be entered accordingly.

(C.D. 4741)

J. C. PENNEY PURCHASING CORPORATION ET AL. *v.* UNITED STATES

Buying commissions

The evidence of record establishes that a Japanese company, known as the Sanyei Corporation, was a bona fide buying agent of plaintiff J. C. Penney Purchasing Corporation and it is therefore held that the amounts paid to Sanyei and described on the invoices as commissions were improperly included in the appraised values of the merchandise at bar.

CRITERIA FOR PRINCIPAL–AGENT RELATIONSHIP

No single factor is determinative in establishing the existence of a bona fide buying agency relationship. The existence of such a relationship must be ascertained by examining all relevant factors and each case is governed by its own particular facts. However, the primary consideration in determining whether the relationship is one of agency is the right of the principal to control the agent's conduct with respect to the matters entrusted to him.

Court Nos. R67/3007, etc.

Ports of Seattle, San Francisco, Los Angeles and Norfolk

[Judgment for plaintiffs.]

(Decided May 8, 1978)

John B. Pellegrini and *Joseph R. Krajci* for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

MALETZ, Judge: These 58 consolidated appeals for reappraisement involve the proper dutiable value of various merchandise imported from Hong Kong and Japan during the period 1956 through 1970. The merchandise was entered at the ports of Seattle, San Francisco, Los Angeles, and Norfolk by J.C. Penney Company, Inc. (hereinafter Penney) or J. C. Penney Purchasing Corporation [1] (hereinafter Purchasing). The basis of appraisement is not in issue since it is agreed that export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1965 (19 U.S.C. 1401a), is the proper basis for appraisement. The parties also agree that each of the appraisements is separable and plaintiffs rely upon the presumption of correctness as to all elements of value except the alleged buying commissions.[2] Thus, the parties agree that the

[1] Purchasing is a wholly owned subsidiary of Penney, and its primary purpose is to import Penney's merchandise bought overseas.

[2] Although some of the complaints in these actions contest the dutiability of certain inland charges, plaintiffs have abandoned all claims relative to the dutiability of such charges.

sole issue presented is whether certain charges listed on the invoices encompassed by the entry papers as "buying commissions" or "handling commissions" are properly included as part of the dutiable export value of the imported merchandise. Stated otherwise, the sole issue is whether a Japanese company, known as the Sanyei Corporation (hereinafter referred to as Sanyei), was a bona fide buying agent of Purchasing and whether the amounts paid to it by Purchasing were buying commissions.

The Statute

Section 402(b) of the Tariff Act of 1030, as amended (19 U.S.C. 1401a), reads as follows:

> (b) Export Value.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

The Record

We consider first the record which consists of the testimony of three witnesses on behalf of the plaintiffs [2] and five exhibits also introduced by plaintiffs. Defendant presented no witnesses but introduced five exhibits. The official papers were received in evidence as unmarked exhibits.

In the circumstances of the present case, the record is best understood by summarizing the testimony of the witnesses.

Testimony of Robert Boulogne

Plaintiffs' first witness, Robert Boulogne, testified that from the latter part of 1964 through mid-1968 he was the manager of Penney's Far East buying operations, which operations had offices in Osaka, Tokyo and Hong Kong. He stated that in this capacity he was responsible for furnishing market information to Penney's central buyers and for providing full buying services and assistance in connection with Penney's purchases in the Far East.

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[2] Plaintiffs' three witnesses were: (1) Robert Boulogne, the manager of the international buying department of Penney, who during the latter part of 1964 through mid-1968 was the manager of Penney's Far East buying operations and was also vice president of Purchasing; (2) George Koegler, Penney's import-export manager for operations; and (3) T. Mizoguchi, vice president of United States and Canadian operations and president of Sanyei, New York. Further, based on the weight of the credible evidence, it is found that Mr. Mizoguchi was director of Sanyei's Osaka office in Japan from 1966 to 1970.

Continuing, Mr. Boulogne testified to the following effect:

Purchasing was a wholly owned subsidiary of Penney and was established for the primary purpose of directly importing merchandise from overseas. The buyers employed by Penney purchased both domestic and imported merchandise; however, when these buyers purchased imports on a direct basis, they did so by instructing Purchasing as to what to buy, whereupon Purchasing entered into buying contracts with suppliers. As a result of this arrangement, the merchandise thus purchased was owned by Purchasing until such time as it was landed in the United States when Purchasing then sold it to Penney and title passed from Purchasing to Penney. Purchasing did not make a profit on its sales to Penney and therefore Penney paid the amount shown on the invoice.

Purchasing had a staff in the Far East which, in addition to Mr. Boulogne, consisted of approximately 12 people in Osaka, seven or eight people in Tokyo, and three to five people in Hong Kong. These employees were known as market representatives, and each of them was assigned a commodity and a territory. The market representatives were foreign nationals who could speak English and act as translators for buyers. As a further part of their duties, they handled correspondence for the merchandise within their respective areas of responsibility; conducted inspections in order to ensure that merchandise conformed to specifications; and researched the market in an attempt to discover which products in their respective areas were suitable for Penney's buyers. In fact, if a Penney buyer wanted to purchase directly from a manufacturer, it was done through Purchasing's market representatives.

Although Purchasing performed the same functions as a buying agent, its staff and facilities were not adequate to cope with the large volume of business Penney conducted in the Far Eastern area. Thus, in order to provide the necessary buying services in that marketplace for "sundry" merchandise such as that involved here (i.e., merchandise comprised of small items manufactured, in some instances, by small, difficult to reach factories), Purchasing would have needed a staff of 150 people and would have had to expand its facilities. Purchasing, however, desired to maintain flexibility in its Far Eastern operations, and to that end it did not expand but rather chose to keep its staff small and its overhead low. In light of this policy, Purchasing needed a buying agent to handle its volume and therefore entered into agency agreements with Sanyei to provide the necessary buying services, particularly for "sundry" merchandise, in Tokyo, Osaka, and Nagoya, Japan, as well as in Hong Kong. In this connection, one large manufacturer of sundry merchandise attempted to sell Penney on a direct basis, but Penney chose not to do so because it felt it

didn't have the personnel and facilities to perform the services Sanyei provided.

The first "Agency Agreement" between Purchasing and Sanyei was dated June 26, 1963 and was entered into by Purchasing and Sanyei's Hong Kong office, while the second, dated July 6, 1964, was entered into by Purchasing and Sanyei's Tokyo office. The language of the two agreements was identical and the agreements in their entirety provided as follows:

> This is to confirm our arrangements made with you whereby you agreed to purchase merchandise for our account, as specified in our orders and contracts forwarded &/or to be forwarded to you. Upon receipt of our orders and contracts you will purchase merchandise for our account for which service we will pay you varying percentages of buying commission depending on the merchandise bought and the maximum commission will be 5%. If purchased from vendors who usually quote on an "ex-factory" basis the commission will be based on the "ex-factory" price – or if purchased from vendors who usually quote on an "F.O.B." basis, the commission will be based on the "F.O.B." price. The names of the manufacturers for each items [sic] invoiced must also appear on the invoices.

A third "Agency Agreement," dated August 13, 1969, was entered into by Purchasing and Sanyei's Osaka office and superseded the first two agreements. This third agreement was in the form of a letter from Purchasing to Sanyei which was agreed to by Sanyei and read as follows:

> This letter designates you as one of our buying agents.
>
> This agency agreement is non-exclusive. The relationship between you and us is subject to the terms and conditions set forth below and in each of our import contracts placed with you.
>
> 1. You shall perform for us the following services:
>
> (a) You will actively investigate buying possibilities which might be of interest to this Company both on your own initiative and as requested by us.
>
> (b) You will purchase and forward to our Far East offices or our United States buyers samples of merchandise as requested by our Far East offices or our United States buyers.
>
> (c) We will send you import contracts for merchandise we desire to purchase. You will purchase the merchandise described in the contract at the cost as stated in the contract, and will charge to us a commission equal to the percentage of the rate stated in the contract. You will purchase the merchandise described in the contract from the supplier designated in the contract, and the name/s of the manufacturer/s of each item must appear on such

invoice/s. You agree to indemnify and hold us harmless against and from all claims of suppliers.

(d) All merchandise purchased by us under contract with you as aforesaid shall first be inspected and approved by you before being shipped to us, and our letters of credit or other methods of payment will be subject to your approval as a condition of payment. You agree that your approval will be granted only if such merchandise (i) conforms to our specifications as set forth in the applicable contract (and all amendments thereto) and is not defective in any respect, (ii) meets the requirements of all U.S. Government laws and regulations as specified in the applicable contract, (iii) is packaged, labeled, priced and invoiced in accordance with the instructions set forth in the applicable contract, and (iv) is packaged in a manner which will insure its safe transportation to this Company's stores or warehouses.

(e) In the case of claims of this Company resulting from defective or rejected merchandise (including, but without limitation, defects discovered after receipt and resale by J. C. Penney Company), you will reimburse us for such defective or rejected merchandise.

(f) Should we send to you labels and tags for use by the supplier, it is understood that you will be billed and you in turn will obtain payment for us from the supplier for such labels and tags. In the event you fail to obtain such payment from the suppliers, you shall be directly liable to us for the amount of such payment at the billing price.

(g) You agree that you will work only with reputable suppliers with sound credit ratings, who are capable of meeting the terms of their contracts. If we shall so request, you will supply us with credit reports and other information concerning suppliers with whom you are, or may be, dealing on our behalf.

2. In consideration of the performance by you of services as one of our buying agents, we agree to pay you the commission at the rate set forth in the import contracts placed with you. The commissions shall not exceed 5% of the supplier's ex-factory (or f.o.b. shipping point) selling price unless otherwise specially agreed by you and us. The commission specified in the import contracts shall represent your entire compensation for work performed on our behalf and you shall not be entitled to any further compensation or reimbursement except that you shall receive reimbursement for the cost of samples forwarded to us pursuant to 1(b) above and related shipping costs.

3. It is understood that you are an independent contractor and that the arrangement between us does not constitute a partnership or employee relationship. No contract for the purchase of merchandise by this Company shall become effective unless signed by a person authorized to sign in the name of the Company and by our appropriate U.S. buyer. No agreement or commitment made on our behalf is binding on us without a confirmation by cable or other writing by a person authorized to act in the name of the Company.

4. The purchase price of all merchandise contracted for will be stated in United States dollars. Our sole responsibility shall be to pay for such merchandise the amount in United States dollars set forth in our contract.

5. This agreement may be terminated by either party at any time by giving the other party prior written notice of the effective date of termination.

6. Upon termination of this agreement, (a) all right and obligations of the parties hereto shall cease and terminate except as to rights and obligations accrued prior to the date of such termination, including rights and obligations under outstanding import contracts not yet performed (b) we shall have the right to deal with all suppliers used by you in connection with business for us either directly or through one or more other buying agents without further obligations to you, and (c) you shall turn over to us any and all copies of contracts and other information in your files relating to arrangements made by you with suppliers of merchandise to us (it being understood that all such contracts and other information shall be treated by you as confidential and shall not be disclosed by you to any third party either during or after the term hereof).

7. This agreement supersedes all previous arrangements between us.

8. This agreement has been executed in accordance with, and shall be governed by, the laws of the State of New York, United States of America.

If the foregoing terms and conditions are satisfactory to you, please sign and return to us the enclosed copy of this letter, whereupon this letter shall constitute a binding agreement between us effective as of the date of this letter.

Against this background, the normal purchasing situation was initiated by the Penney buyer apprising Purchasing of the type of merchandise he was seeking. Purchasing then advised Sanyei of the specified merchandise and Sanyei in turn researched the market, contacted manufacturers, and obtained samples in preparation for the buyer's visit.

The samples obtained by Sanyei were displayed to the buyer in Sanyei's showroom (which in Osaka was about 40 feet by 60 feet) where the price of the merchandise was usually marked on the samples and Sanyei would then give the buyer various estimates of costs above the price marked on the samples, which costs included inland charges, storage charges, lighterage, etc. This enabled the buyer to have an estimate of the f.o.b. price of the article. On the buyer's first visitation, Sanyei's showroom would collect a fairly large selection of samples for the Penney buyer to give him an idea of what was available in the market. However, Sanyei did not display a full line of merchandise or, at any given time, have samples for every type of article. Nor did Sanyei maintain an inventory. As the buyer got the feel of merchandise, he would become more specific as to which manufacturers to go to and what areas and groupings of merchandise he would want to see.

In the usual situation, the buyer would first go to Sanyei's showroom and then proceed to the factory with representatives from both Sanyei and Purchasing. About 20%–30% of a buyer's time was spent at Sanyei and 70% at factories.[4] Substantial negotiations took place at the factory, but in the main, the finalization of these negotiations was conducted in Sanyei's offices where the Penney buyer made a final review of the merchandise submitted by the manufacturer. A price would be decided upon, and a firm decision to purchase a particular commodity would be made. When this occurred, Purchasing would enter into a contract for the particular merchandise, indicating a specific quantity and delivery date. These contracts were between Purchasing and Sanyei and were signed by one of Purchasing's officials. Each contract contained, in the lower right-hand corner, a heading which stated "We accept and agree to fill this order as per terms and conditions of above contract," which was signed by the party to whom "the contract is made out to." In the present cases, the party is Sanyei. Neither Purchasing nor Penney signed any contracts for the sale of this merchandise with the manufacturers of the merchandise. The witness assumed that title passed from Sanyei to Purchasing and not from the suppliers to Purchasing.

In some contracts between Purchasing and Sanyei, the name of the manufacturer was not specified, while in other contracts the name of the manufacturer was specified. However, Purchasing's market representatives had the responsibility of insuring that the factory designated by the Penney buyer produced the merchandise. Thus, after the Penney buyer specified a particular manufacturer, a market representative of Purchasing almost always followed up by making sure that Sanyei obtained the merchandise from that manufacturer.

[4] In a previous deposition, Mr. Boulogne testified that a Penney handbag buyer would spend only about 30% of his time at the factory.

The manufacturers would have had to know that merchandise was destined for Penney because a great deal of the merchandise had Penney identification labels. This they would also have known from buyer visitations and Penney carton markings.

Upon receipt of the contract, Sanyei would issue an order to the manufacturer on behalf of Purchasing and would service the contracts, inspect the merchandise at the factory, take care of the documentation, mark the shipments and transmit further instructions which Purchasing gave to Sanyei, such as changes in packaging specifications. Sanyei would arrange for the shipment of the merchandise from the factory to Sanyei's warehouse or to the port of debarkation. Penney never paid for merchandise before it was aboard the vessel. The merchandise was insured, and if it was lost before it was laden aboard the vessel, Sanyei would process the insurance claim for Purchasing. If there was nonconforming merchandise, Sanyei would obtain restitution from the manufacturer and a cash payment was drawn against Sanyei. In such situations, Purchasing was never compensated by the manufacturer directly.

Purchasing's payment for merchandise was effected through letters of credit drawn to Sanyei. Upon presentation of the proper documentation which included invoices of Sanyei covering the merchandise in question and specified documents including certificates of inspection, the bank would make payment to Sanyei against Purchasing's letter of credit. It was not necessary for Sanyei to present the invoices from the actual manufacturers nor the receipts for transportation charges from the Sanyei warehouses to the ship in order to collect on Purchasing's letters of credit. Receipts from the transportation companies were not needed by Purchasing because Purchasing purchased f.o.b.

In the event a manufacturer could not produce a certain product, Sanyei could not use another manufacturer without Purchasing's authority to do so for the reason that qualities between manufacturers varied. Such authority by Purchasing was necessary even if a substitute product was of equal price and equal quality and notwithstanding that it would make no difference to Penney as to who manufactured the article.

Purchasing paid Sanyei a buying commission of 5% of the ex-factory price.[5] There was no separate charge for the inspection services which Sanyei performed for Purchasing; instead, compensation for such inspection services (which Sanyei always performed on each shipment for Purchasing) was included in the 5% commission. Sanyei was

[5] Initially, Mr. Boulogne testified that a 5% commission was always paid (R. 27-28). Later he modified this and testified that in 99% of the instances he recalled a 5% commission was paid (R. 76-77). More specifically, the official papers indicate that the 58 entries here involved cover 65 orders. Of these 65 orders, the official papers show that a commission of 5% was paid on 60 orders; a commission of 3% was paid on two orders; and a commission of 2% was paid on three orders. See Appendix A of defendant's brief.

required to present a certificate of inspection with the document package provided to Purchasing, certifying that Sanyei had inspected the goods to ensure that the goods conformed to Purchasing's specifications. This certificate was required before Sanyei could receive payment through the letter of credit.

Testimony of T. Mizoguchi [4]

Mr. Mizoguchi, who was director of Sanyei's Osaka office from 1966 to 1970 (see note 3, *supra*), testified to the following effect:

During the above period, Purchasing would advise Sanyei that it was interested in certain items specifying the price range, color, size and other details. Sanyei would obtain samples meeting these requirements and make all the necessary preparations for the purchase of these items. Frequently, marketing representatives from Purchasing would work in conjunction with Sanyei in negotiating price and arranging for the manufacture of these articles. These negotiations and arrangements would take place either at Sanyei's showrooms or at the manufacturer's factory.

Sanyei would do nothing until it received a contract of purchase and a letter of credit from Purchasing at which time Sanyei would place the order. Before the manufacturer completed the order, Sanyei personnel would inspect the goods against the sample at the factory; in some instances, Purchasing market representatives would accompany them on these inspections. If the goods were satisfactory the manufacturer would then ship them to the Sanyei warehouse. During this time if the goods were destroyed or lost, the responsibility for the loss was on the manufacturer.

When the merchandise reached the warehouse, Sanyei would ask Purchasing to inspect the goods and would receive further shipping instructions. In situations where the manufacturer could not fill an order or the manufacturer stated it could not meet the negotiated price, Sanyei would always request further instructions from Purchasing before taking any further action.

Sanyei never received compensation from, never invested money with, nor did it ever share its commissions with any of the manufacturers supplying Penney. Furthermore, the manufacturers' invoice prices were the same prices Sanyei invoiced Penney for the merchandise.

Sanyei was paid by a letter of credit issued by Purchasing and it would borrow money against these letters of credit. Sanyei paid the manufacturer 70% to 80% of the full amount of the letter of credit and paid the balance due after shipment was made to Purchasing.

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[4] Plaintiffs' third witness, George Koegler, was called for the sole purpose of identifying the Hong Kong "Agency Agreement."

Sanyei insured the merchandise, and if goods were lost after leaving the factory and before reaching the Sanyei warehouse, Sanyei would negotiate the claim with the insurance company on behalf of Purchasing. If goods were defective or nonconforming, Sanyei settled the claim in accordance with the Penney buyer's instructions.

Sanyei had showrooms in Osaka, Tokyo and Nagoya which never maintained an inventory. However, these showrooms had samples of a full line of merchandise.

Sanyei's commissions from Purchasing were always 5% of the ex-factory price;[7] in addition to these charges, there were shipping charges, storage insurance, inland charges, miscellaneous charges, and inspection fees.[8]

There were instances where Sanyei would borrow against Purchasing's letters of credit to advance manufacturers money to buy materials. Purchasing usually issued the letters of credit two to three months before shipment and the banks would loan Sanyei money against these letters of credit as soon as they were issued. It was not necessary for Sanyei to produce bills of lading to show the merchandise was on board a vessel in order to borrow against these letters of credit; however, Sanyei could not collect on the letters of credit until the merchandise was on the ship. Purchasing knew that Sanyei was borrowing against the letters of credit but never gave Sanyei express permission to do so and, therefore, Sanyei was responsible for these loans. During the period in question, there was no instance where a manufacturer who was advanced money to buy materials did not deliver the merchandise.

After the merchandise was manufactured, Sanyei made provisions for shipping in accordance with Purchasing's instructions. If the merchandise was lost between the factory and Sanyei's warehouse, the manufacturer bore the loss and thus collected the insurance. On the other hand, if merchandise was destroyed in the Sanyei warehouse or lost or destroyed between the warehouse and the pier, the insurance would be collected by Sanyei on behalf of Purchasing and paid to Purchasing.

Sanyei was paid by Purchasing when the merchandise was on the vessel and Sanyei presented a bill of lading to the bank. Sanyei paid the insurance premiums in advance as the agent of Purchasing and

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[7] See note 5, *supra*.

[8] Mr. Mizoguchi's testimony that Sanyei's inspection fee was an additional charge over and above the 5% commission is in direct conflict with Mr. Boulogne's testimony that the 5% commission *included* the inspection fee. It is also in direct conflict with the third "Agency Agreement," *supra*, which provided that the commission not to exceed 5% shall represent Sanyei's *entire* compensation for work performed on Purchasing's behalf. See par. 2. The agreement further specified that included in the work Sanyei was required to perform on Purchasing's behalf was the *inspection* and approval of all merchandise purchased by Purchasing before shipment. See par. 1(d). Considering these provisions of the agency agreement and Mr. Boulogne's testimony, it must be concluded that Mr. Mizoguchi's testimony on this score was in error and that compensation for Sanyei's inspection services was included in the 5% commission.

was reimbursed for such premiums as well as its 5% buying commission and other charges advanced on behalf of Penney when it presented its bill of lading quoting f.o.b. prices on the merchandise to the bank holding the letter of credit.

As far as the manufacturer was concerned, his responsibility for the merchandise ended when he left the goods at Sanyei's warehouse. At that time, Purchasing owned the goods because Sanyei had a letter of credit for the goods and purchased them for Purchasing as its agent.

Manufacturers in Japan would sell to buyers directly. Therefore, Purchasing could have but chose not to buy goods directly from any of the manufacturers here involved because it did not have sufficient facilities to export these goods from Japan to the United States, and it was for that reason Purchasing utilized Sanyei's buying services.[9]

The Law

Turning now to the law, it is basic that the values found by the government are presumptively correct and that the plaintiffs have the burden of proving first that the appraised values are erroneous and second that the plaintiffs' claimed values are correct. However, where, as here, plaintiffs challenge but one of the elements entering into the appraisements under scrutiny and since it is agreed that the appraisements are separable, plaintiffs can rely upon the statutory presumption of correctness as to all other elements of value. E.g., *United States* v. *Imperial Products, Inc.*, 65 CCPA 38, C.A.D. 1203, 570 F. 2d 337 (1978); *United States* v. *Bud Berman Sportswear, Inc.*, 55 CCPA 28, C.A.D. 929 (1967); *United States* v. *H. M. Young Associates*, 62 CCPA 20, C.A.D. 1138, 505 F. 2d 721 (1974). Thus, plaintiffs' exclusive burden is to establish that the commissions paid Sanyei were bona fide buying commissions. In defendant's words (Br. p. 25):

> * * * where an export value appraisement is made upon the basis of an ex-factory amount plus certain inland charges and an alleged buying commission, and the plaintiff claims that the ex-factory amount represents the proper export value, the plaintiff must prove that the buying agency was a true, *bona fide* principal-agent relationship. *B & W Wholesale Co., Inc.* v. *United States*,

[9] With regard to Sanyei's operation in Hong Kong, the testimony of Mr. Boulogne is that the services performed by Sanyei for Purchasing in Hong Kong were the same as those provided in Japan. This is supported by an affidavit of M. Hasegawa, director of Sanyei Corporation (Hong Kong) Ltd. (hereinafter Sanyei Hong Kong), which attests that his firm has acted as Purchasing's buying agent since 1963. In this capacity, according to the affidavit, Sanyei Hong Kong, acting on behalf of Purchasing, placed orders with various manufacturers, inspected merchandise, arranged for shipment and prepared the documentation. The affidavit further states that Sanyei does not buy for its own account for resale, but purchases for Purchasing only upon specific instructions. Finally, the affidavit declares that Sanyei Hong Kong received no remuneration whatsoever from any of Purchasing's manufacturers, nor did it in any way own or control such manufacturers during the period in question.

58 CCPA 92, C.A.D. 1010, 436 F. 2d 1399 (1971); *Park Avenue Imports* v. *United States*, 62 Cust. Ct. 1035, A.R.D. 255 (1969).

The appraisement in this case appears in the traditional, separable form. Thus, plaintiff, in order to establish a *prima facie* case and discharge its dual burden of proof, need only prove the non-dutiable character of the alleged buying commission. Its proof, however, must be by a preponderance of the credible evidence. *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, 547, R.D. 11758 (1971).

It is, of course, fundamental that a bona fide buying commission is not a proper element of dutiable value. E.g., *United States* v. *Nelson Bead Co.*, 42 CCPA 175, C.A.D. 590 (1955); *United States* v. *S. S. Kresge Co. et al.*, 26 CCPA 349, C.A.D. 39 (1939); *Knit Wits (Wiley) et al.* v. *United States*, 59 Cust. Ct. 753, R.D. 11401, 278 F. Supp. 291 (1967), *aff'd*, 62 Cust. Ct. 1008, A.R.D. 251, 296 F. Supp. 949 (1969); *Carolina Mfg. Co.* v. *United States*, 62 Cust. Ct. 850, R.D. 11640 (1969). In this setting, the court concludes for the reasons that follow that the evidence of record establishes that Sanyei was plaintiffs' bona fide buying agent and that the amounts paid to Sanyei constituted compensation for the type of services normally performed by such agents. Therefore, the amounts paid to Sanyei and described on the subject invoices as commissions were improperly included in the appraised value of the merchandise at bar.

No single factor is determinative in establishing the existence of a bona fide buying agency relationship. The existence of such a relationship must be ascertained by examining all relevant factors and each case is governed by its own particular facts. However, the primary consideration in determining whether the relationship is one of agency is the right of the principal to control the agent's conduct with respect to the matters entrusted to him. *B & W Wholesale Co., Inc.* v. *United States*, 58 CCPA 92, 95, C.A.D. 1010, 436 F. 2d 1399, 1402 (1971); *Dorf International, Inc., et al.* v. *United States*, 61 Cust. Ct. 604, 610, A.R.D. 245, 291 F. Supp. 690, 694 (1968); *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, 546, R.D. 11758, 337 F. Supp. 465 (1971). The evidence of record points to the fact that the activities of Sanyei with regard to the subject merchandise were at all times controlled by plaintiffs. The role of plaintiffs in the selection of the subject merchandise, including selection of the factory, was active, not passive, and Sanyei was given no discretion in the purchase of the subject merchandise.

More specifically, the services performed by Sanyei were similar to those provided by plaintiffs' Far East buying offices in other commodity areas. In general, Sanyei provided Penney buyers with market information and assisted them in direct import buying activities. While plaintiffs could have purchased the subject merchandise

directly from the factories without Sanyei's intervention, plaintiffs chose to deal through Sanyei as an economy measure and to maintain flexibility. The fact that an importer has an opportunity to purchase merchandise directly, without being required to seek the assistance of an intervening party, has been held to support the existence of an agency relationship. *United States* v. *Alfred Kohlberg, Inc.*, 27 CCPA 223, 227, C.A.D. 88 (1940); *United States* v. *Enrique Vidal Sanchez*, 15 Ct. Cust. Appls. 443, 450–51, T.D. 42642 (1928); *F. W. Woolworth Co. et al.* v. *United States*, 6 Cust. Ct. 729, R.D. 5094 (1941).

The record establishes that before Penney buyers traveled to Japan and Hong Kong to purchase merchandise, Sanyei was instructed to research the market and gather samples of merchandise in which the Penney buyers expressed an interest. After the general sample line gathered by Sanyei had been reviewed the buyers would choose specific items of interest. This review would be followed by factory visitations by Penney buyers accompanied by representatives of Purchasing and Sanyei. During these meetings at the factories, negotiations as to price, styling and delivery took place. The fact that the importer actually visited factories and participated in negotiations with the factory has been accorded significance by this court in finding the existence of an agency relationship. *United States* v. *Gitkin Co.*, 46 Cust. Ct. 788, 791, A.R.D. 132 (1961); *Hub Floral Mfg. Co.* v. *United States*, 60 Cust. Ct. 905, 906–7, R.D. 11544 (1968).

Another consideration is that all of the subject merchandise was purchased from the factories by Sanyei on behalf of Purchasing and that the factories were aware that plaintiffs, not Sanyei, were the purchasers of the merchandise. The fact that a factory was aware that the importer and not the intervening agent was the purchaser of merchandise has been cited by this court as evidence of a buying agency relationship between the importer and the intervening agent. *Knit Wits (Wiley) et al.* v. *United States, supra*, 59 Cust. Ct. at 761.

Beyond this, Sanyei placed orders for the subject merchandise with the factories only after having been instructed to do so by plaintiffs. If a factory was unable to fill an order placed by Sanyei for plaintiffs, Sanyei had to look to plaintiffs for further instructions since Sanyei could not choose another factory without direction from plaintiffs. The fact that an intervening party can only place an order with a factory after that party has received such instructions from an importer is further evidence of the existence of a buying agency. *Knit Wits (Wiley) et al.* v. *United States, supra*, 59 Cust. Ct. at 761; *United States* v. *Supreme Merchandise Company*, 48 Cust. Ct. 714, 719, A.R.D. 145 (1962).

The record also demonstrates that Sanyei, in addition to compiling market information, gathering samples, and assisting in factory nego-

tiations, performed services which included translation, inspection, placing purchase contracts, arranging for inland shipment, and payment for merchandise. Such services are typical of those rendered by a buying agent in procuring merchandise for his principal. *United States* v. *Supreme Merchandise Company, supra*, 48 Cust. Ct. at 718; *Chadwick-Miller Importers, Inc., et al.* v. *United States*, 66 Cust. Ct. 573, R.D. 11743 (1971); *Carolina Mfg. Co.* v. *United States, supra*, 62 Cust. Ct. at 853; *Reliance International Corp.* v. *United States*, 62 Cust. Ct. 845, 849, R.D. 11639, 305 F. Supp. 20, 24 (1969).

This court in *Chadwick-Miller Importers, Inc., et al.* v. *United States, supra*, 66 Cust. Ct. at 578, in discussing an importer's testimony with respect to the tasks performed by his buying agent stated:

> * * * their services in seeking out for him manufacturers of the kinds of goods he wished to order and in negotiating price and other terms with sellers, their attention to shipping, checking deliveries and the conformity of goods to samples, and other such services, shows a relationship such as has been presented to the court in many cases where United States buyers are confronted, notably in Japan and in Hong Kong, with many small manufacturers. It is a relation founded on the necessity of having one's own representative to speak for the buyer in such a foreign market. In customs jurisprudence these representatives are known as buying agents.

These are the same services performed by Sanyei and the reasons for engaging an agent are the same as those in the present case.

The record shows also that Sanyei had no financial interest in any of the manufacturers of the subject merchandise; that Sanyei was compensated for its services solely through a commission paid by plaintiffs; that Sanyei received no compensation or payment from the factories; and that Sanyei did not share commissions with factories. An important mark of a buying agency is the fact that none of the commission inures to the benefit of the manufacturer. *Carolina Mfg. Co.* v. *United States, supra*, 62 Cust. Ct. at 854. As the court stated in *Reliance International Corp.* v. *United States, supra*, 62 Cust. Ct. at 849:

> Commissions paid by the purchaser to agents for services rendered in procuring the merchandise, inspecting and packing goods, arranging for shipment and acting as a paymaster for account of the buyer, *no part of which commissions inure to the benefit of the seller*, are buying commissions. *United States* v. *Nelson Bead Co., supra; United States* v. *Gitkin Co.*, 46 Cust. Ct. 788, A.R.D. 132; *Lollytogs, Ltd.* v. *United States*, 55 Cust. Ct. 608, Reap. Dec. 11073; *United States* v. *Supreme Merchandise, supra*. [Emphasis added.]

An affidavit by the director of Sanyei Hong Kong (see note 8, *supra*) is further proof that the relationship between plaintiffs and

Sanyei was a buying agency. The affidavit affirms that Sanyei acts as a buying agent for plaintiffs, and it emphasizes the fact that Sanyei did not buy for its own account but for plaintiffs' account, and only upon specific instructions from plaintiffs. An affidavit by a party attesting to its status as a buying agent has evidentiary weight in determining a buying agency question. *Dorco Imports* v. *United States*, 67 Cust. Ct. 503, 512, R.D. 11753 (1971); *Vicki Enterprises, Inc., et al.* v. *United States*, 67 Cust. Ct. 480, 487, R.D. 11750 (1971), *aff'd*, 68 Cust. Ct. 324, A.R.D. 302, 343 F. Supp. 1381 (1972), *aff'd*, 61 CCPA 75, C.A.D. 1125, 496 F. 2d 1403 (1974).

The existence of a buying agency is also indicated by the "Agency Agreements" quoted before. These agreements tend to prove that Sanyei's role was one of agency. In this connection, the existence of a buying agency agreement has been cited by this court as supporting a buying agency relationship, particularly in the absence of any testimony by defendant. *Dorco Imports* v. *United States*, *supra*, 67 Cust. Ct. at 512.

Defendant insists, however, that there was not a bona fide buying agency relationship between plaintiffs and Sanyei because, among other things, (1) the merchandise at bar was sold on an f.o.b. basis, and (2) Sanyei's commissions were an integral part of the f.o.b. prices and as such a proper element of dutiable value.

As to the first of these contentions, it is quite true that the subject merchandise was purchased on an f.o.b. basis. But the record is clear (1) that these f.o.b. prices were arrived at on the basis of the *invoiced ex-factory prices* with charges added for inland freight, insurance, lighterage and buying commissions, and (2) that the total of these charges made up the f.o.b. prices. This is reflected in the government appraisement itself which was made at the invoiced *ex-factory prices* plus the additional charges, including buying commissions. Since the appraisement is concededly separable, plaintiffs may rely on the presumption that the merchandise was *sold* at *ex-factory prices plus* the additional charges and that these ex-factory prices were the freely offered prices. See e.g., *United States* v. *Imperial Products, Inc.*, 65 CCPA 38, C.A.D. 1203, 570 F. 2d 337 (1978). And it is to be added that in situations virtually identical to those here—where invoices were made out on the basis of ex-factory prices plus specified charges, and f.o.b. Japanese port prices were quoted—bona fide buying commissions were held to exist. See, e.g., *Reliance International Corp.* v. *United States*, *supra*, 62 Cust. Ct. at 847; *Carolina Mfg. Co.* v. *United States*, *supra*, 62 Cust. Ct. at 852; *United States* v. *Knitwits (Wiley) et al.*, 62 Cust. Ct. 1008, A.R.D. 251, 296 F. Supp. 949 (1969).[10] See also *Mitsui &*

[10] The obvious reason why the subject merchandise was purchased on an f.o.b. basis was to enable the plaintiffs to know the total cost of the merchandise which they were purchasing and thus issue a letter of credit sufficient to cover such costs. See, e.g., *Lollytogs, Ltd.* v. *United States*, 55 Cust. Ct. 608, 611, R.D. 11073 (1965).

Co. (*U.S.A.*), *Inc.* v. *United States*, 66 Cust. Ct. 553, R.D. 11740 (1971).

We come now to defendant's second contention that Sanyei's commissions were an integral part of the f.o.b. prices and as such a proper element of dutiable value. The basic premise of this argument is that plaintiffs could not have purchased the subject merchandise without paying a commission to Sanyei. This proposition is central to the decisions which follow that are cited by defendant in support of its argument. Thus defendant places heavy reliance on *United States* v. *Erb & Gray Scientific, Inc.*, 54 Cust. Ct. 791, A.R.D. 186 (1965), *aff'd*, 53 CCPA 46, C.A.D. 875 (1966). But in *Erb* the court found that the importer could *not* have purchased the merchandise there involved (i.e., electron microscopes) without paying certain installation and maintenance fees for the services of Japanese engineers trained by the manufacturer since such fees were necessary to make the imported microscopes operational. Accordingly, the court held that such fees were dutiable. 54 Cust. Ct. at 795, 53 CCPA at 51–52. In *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958)—which defendant also relies on—the court based its decision on the finding that the subject merchandise could not have been purchased at a price which did not include the inland freight charges. 46 CCPA at 19. The same is true of *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553 (1954), *cert. denied*, 348 U. S. 823 (1954), which defendant further cites. And in another case cited by defendant—*BBR Prestressed Tanks, Inc., et al.* v. *United States*, 64 Cust. Ct. 787, A.R.D. 265 (1970)—the court noted that the importer had no choice but to pay the alleged royalty fee. 64 Cust. Ct. at 790.

In further support of its argument, defendant refers to *International Fashions* v. *United States*, 64 CCPA 35, C.A.D. 1180, 545 F. 2d 138 (1976), *aff'g* 76 Cust. Ct. 92, C.D. 4640, 408 F. Supp. 1386 (1976). While that case presents a somewhat different situation than the other cases previously cited, the case, in effect, stands for the proposition that a fee which *must* be paid by the importer is part of dutiable value. More particularly, the court in *International Fashions* held that a charge labeled as a 5% commission which was paid to the manufacturer's managing director was an expense properly includable in dutiable value since the inspection service permeated the entire manufacturing process. The court noted that if the importer desired merchandise which was quality controlled the 5% charge had to be paid and that the seller performed the inspection services. 545 F. 2d at 139–40. Further, the lower court clearly distinguished the situation before it from cases involving buying commissions by pointing out that a buying commission concerns the *manner* of purchase whereas the case before it concerned the *nature* of what was purchased. In short,

International Fashions, like the other decisions on which defendant relies, is clearly distinguishable from the present case since the evidence of record clearly establishes that here plaintiffs could have purchased the subject merchandise without the intervention of Sanyei and without paying the commission. Thus the commissions here in issue were not an integral part of the f.o.b. price.

Defendant next argues that Sanyei acted as the seller in the transaction at bar, not as plaintiffs' agent. An important element of this argument is that Sanyei assumed title to the subject merchandise and paid the manufacturer for the merchandise and, therefore, cannot be considered as plaintiffs' agent but must be considered as the seller. With respect to this argument, the record is not clear as to whether or not Sanyei obtained title to the merchandise. On the one hand, Mr. Boulogne testified that he was assuming that title passed from Sanyei to Purchasing and not from the suppliers to Purchasing. On the other hand, Mr. Mizoguchi testified that when the manufacturer transferred the goods to Sanyei's warehouse Purchasing owned the goods because Sanyei had a letter of credit for the goods and purchased them for Purchasing as its agent. In addition, the record indicates (1) that if the merchandise was lost between the factory and Sanyei's warehouse, the manufacturer bore the risk of loss and collected the insurance; and (2) that if the merchandise was destroyed in the Sanyei warehouse or lost or destroyed between the warehouse and the pier, the insurance would be collected by Sanyei on behalf of Purchasing and paid to Purchasing. In this circumstance, it would appear that Sanyei at no time had an insurable interest or bore the risk of loss which factors would tend to indicate that title passed directly from the manufacturer to Purchasing and not to Sanyei.

However, it is not necessary to determine whether or not title passed to Sanyei for even assuming *arguendo* that it did, "[t]he assumption of title" (as defendant observes, surreply brief, p. 7) "is only one factor in determining agency and the question of whether one is an agent must be determined from the total factual context." Thus in *Mitsui & Co. (U.S.A.), Inc.* v. *United States*, *supra*, 66 Cust. Ct. 553, the court held that the fact that an alleged buying agent took title to the goods did not preclude the court from finding that a bona fide buying agency existed. See also, e.g., *Windsor Steel Products* v. *Whizzer Industries*, 157 F. Supp. 284 (E.D. Mich. 1957), *aff'd*, 261 F. 2d 837 (6th Cir. 1958). And in the total factual context here, the record is clear, as previously discussed, that the activities of Sanyei with regard to the sale of the subject merchandise were at all times controlled by plaintiffs.[11]

[11] It is to be noted that when an agent purchases goods for his principal and for a commission, even though the agent pays the purchase price and accepts delivery, and then redelivers to his principal who reimburses the agent for all costs and expenses, the relations' ip between agent and principal is not a seller-buyer relationship. *Carmichael* v. *Lavengood*, 112 Ind. App. 144, 44 N.E. 2d 177 (1942). See also *John I. Haas, Inc.* v. *Ellis*, 227 Or. 170, 361 P. 2d 820 (1961).

Additionally, defendant contends that Sanyei was not an agent because plaintiffs assertedly did not have the right to control the means through which Sanyei acted. Plaintiffs are stated to be interested solely in the results. Defendant cites Mr. Boulogne's testimony in support of this contention. The specific testimony relied upon is apparently the statement that assuming all manufacturers produced goods of equal quality and equal price Penney would not be concerned with the identity of the manufacturer. However, as Mr. Boulogne's testimony indicates, Penney was concerned with the identity of the manufacturer precisely because not all manufacturers produced goods of equal quality. In fact, the record shows that Sanyei could not substitute manufacturers without express authority from Purchasing.[12] Other indications that plaintiffs exercised control over Sanyei's activities in this respect appear evident from the facts that: Sanyei could do nothing until it obtained purchase orders from Purchasing; if a manufacturer could not meet the negotiated price, Sanyei would have to get further instructions before taking further action; if goods were defective Sanyei settled the claim according to Penney's instructions; and Penney's buyers and not Sanyei's personnel chose the particular manufacturer.

In additional support of its argument that Sanyei was not an agent because plaintiffs assertedly did not have the right to control the means through which Sanyei acted, defendant relies on two decisions: *B & W Wholesale Co., Inc.* v. *United States*, 58 CCPA 92, C.A.D. 1010, 436 F. 2d 1399 (1971), *aff'd*, 63 Cust. Ct. 691, A.R.D. 262 (1969), *aff'd*, 58 Cust. Ct. 728, R.D. 11311 (1967); and *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, R.D. 11758, 337 F. Supp. 465 (1971). Both decisions are clearly distinguishable from the case at bar.

The facts in B & W Wholesale are not at all similar to those presented here. In *B & W Wholesale* the importer had no control over the alleged buying agent's choice of factories. 58 CCPA at 95. The evidence before the trial court included the fact that, in purchasing the subject merchandise, the only premises which the importer visited before placing orders were those of the alleged agent. 58 Cust. Ct. at 730.

On the other hand, the record here shows that it was plaintiffs, not Sanyei, who determined which manufacturers were to receive

[12] To rebut this evidence defendant analyzed the Penney purchasing contracts and noted that some of these contracts did not specify any manufacturer and some were not signed by representatives of Penney. In particular, defendant cites eight specific transactions where the manufacturer was specified as Okano Henshoku although the invoices showed that Sanyo Brush manufactured the articles. However, little weight can be given to this evidence which is based solely on the invoices, considering that two credible witnesses testified without contradiction that the identity of the manufacturers was always specified by the Penney buyers and changes could not be and were not made without the express authority of the plaintiffs. See *Davis Products, Inc., et al.* v. *United States*, 59 Cust. Ct. 226, 230-31, C.D. 3127 (1967). Also to be noted is the fact that these witnesses were not cross-examined by defendant as to these eight specific transactions.

orders. Also, it was the general practice for plaintiffs' buyers to visit the individual manufacturers before instructing Sanyei to place orders.

Moreover, in *B & W Wholesale*, the importer had reason to believe that the inland charges were excessive, but it still did not ask the alleged buying agent to substantiate the charges. 58 Cust. Ct. at 730.

In the present case, while the record is not clear as to whether plaintiffs checked the amounts listed as inland freight charges, there is no indication that plaintiffs suspected that such charges were excessive, and in fact plaintiffs felt that Sanyei did its business in an honorable manner.

The *Globemaster* case also contains factual elements which militate against finding a principal-agent relationship. There the evidence demonstrated that the alleged buying agent bore the risk of any increase in price. 67 Cust. Ct. at 544. Here the evidence demonstrates the contrary. If a manufacturer was required to raise prices, plaintiffs were consulted and plaintiffs, not Sanyei, bore the risk. In *Globemaster* the importer never negotiated prices with manufacturers. 67 Cust. Ct. at 544. Here, it is clear that plaintiffs did negotiate price and other matters, such as quality and delivery, directly with manufacturers.

Lastly, defendant contends that Sanyei's services were identical with services performed by Purchasing's local market representatives. It is quite true that Purchasing's local market representatives performed services similar to those performed by Sanyei; however, such services were not performed with respect to the same shipments.

For the foregoing reasons, the court concludes that the amounts paid to Sanyei represented commissions paid to a bona fide buying agent and are, therefore, buying commissions which are not a proper element of dutiable value. Therefore, it is held that export value in the present case equals the appraised values less the charges for buying commissions. Judgment will be entered accordingly.

C.D. 4742

AIR-SEA BROKERS, INC. *v.* UNITED STATES

American goods returned—
Electronic components

AMERICAN GOODS RETURNED

Electronic components exported from Belgium and Hong Kong, alleged to be of American origin, are claimed to be entitled to free entry under the provisions of item 800.00 TSUS. *Held* for defendant.

AMERICAN GOODS RETURNED

Compliance with customs regulations relating to claims for free entry of American goods returned under item 800.00 *supra* is man-

datory unless waived or plaintiff establishes impossibility of compliance. *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937); *Madeline Britton, V. A. Lessor & Co.* v. *United States*, 29 Cust. Ct. 314, C.D. 1485 (1952).

Court No. 75–4–00848

Port of Boston

[Judgment for defendant.]

(Decided May 16, 1978)

Doherty and Melahn (*William E. Melahn* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*John N. Politis* and *Sidney N. Weiss*, trial attorneys), for the defendant.

FORD, Judge: By this action, the court has before it for determination the issue as to whether certain electronic components exported from Belgium and Hong Kong are entitled to duty-free entry as American goods returned under item 800.00 of the Tariff Schedules of the United States.[1] Free entry is based upon whether Air-Sea Brokers, Inc., the plaintiff-importer of record (a licensed customhouse broker) has complied with the requirements for duty-free entry under the applicable statutes and regulations. Additionally, plaintiff has raised the issue of whether the doctrine of equitable estoppel may be invoked against the United States with respect to acts of certain customs employees.

The merchandise was entered at the port of Boston for the account of H. H. Scott, Inc., Maynard, Massachusetts. The entries were liquidated and all liquidated duties have been paid by plaintiff in behalf of Scott, now defunct. Scott is not a party to this action.

The merchandise was classified by Customs under one or more of the following provisions of the tariff schedules: Items 682.05, 682.60, 685.25, 685.90 or 686.10, schedule 6, part 5 of TSUS, which covers electrical machinery and equipment. In its brief plaintiff enumerated the aforesaid items and the applicable rates of duty seriatum without further description, correctly stating that the descriptions would not materially affect the disposition of the case.

Plaintiff by timely protest and summons claims it is entitled to entry free of duty under item 800.00 which provides:

SCHEDULE 8. – SPECIAL CLASSIFICATION PROVISIONS

Part 1. – Articles Exported and Returned

* * * * * * *

[1] At the trial counsel for both parties indicated that the primary issue was whether or not the Customs Service waived the requirements of documentation. Plaintiff's counsel raised the additional issue of estoppel. Briefs of both parties, however, are addressed to the duty-free issue.

Subpart A. – Articles not Advanced or Improved Abroad

* * * * * * *

800.00	Products of the United States when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad	Free

It is alleged by plaintiff that the involved merchandise consists of electronic parts which are the growth, produce, or manufacture of the United States which were exported from the United States to Belgium and Hong Kong and then returned to the United States without having been advanced in value or improved in condition by any process of manufacture while abroad. The parties are in agreement that at the time of entry, certain documents required by section 10.1 of the Customs Regulations (19 C.F.R. § 10.1), namely, the so-called foreign shippers declaration and a certificate of exportation, were not produced, and the merchandise was permitted conditionally free entry under bond to produce said documents. Additionally in its answer the Government avers the declaration of the owner, consignee, or agent on customs form 3311 was not produced for any of the involved entries. Plaintiff contends the district director of customs at Boston canceled the filing requirements of missing documents as evidenced by the remarks column of the entry papers; that the plaintiff-broker was notified of the cancellation by means of returned "Missing Document Receipts" (RC–1–24); that such cancellation approximately 1½ years prior to the date of liquidation-billing constituted a waiver of documentary requirements as permitted by section 10.1(d) of the Customs Regulations; that pursuant to this waiver, the entries should have been liquidated free of duty under TSUS item 800.00 as American goods returned.

Plaintiff further claims the action of the district director in canceling the documents indicated the district director was fully satisfied with respect to all documentary requirements. It is alleged that in the intervening period between the time of the cancellation and liquidation the actual importer, H. H. Scott, Inc., became financially distressed and was unable to pay its legal debts. Plaintiff maintains that in relying upon the action of cancellation by the district director it has been prejudiced by not being made aware of the claim of the district director until 1½ years after notice of cancellation and, as a result, was unable to obtain compensation for the monies paid on behalf of Scott. Plaintiff argues since it has substantially changed its position as a result of the district director's action, the latter should be estopped to disclaim the effect of his actions.

The Government denies the district director of customs canceled the requirements for missing documents as required by section 10.1

of the Customs Regulations and avers he canceled the bond plaintiff had posted for the late production of the documents. It is further contended the importer was informed through customs form 5561 that the Customs Service intended to assess duties on the three entries. A customs import specialist subpoenaed by plaintiff testified he had met with an officer of Air-Sea Brokers, Inc. and advised him that Customs was making the entries dutiable unless plaintiff came up with evidence which would warrant Customs changing its position and "making the entries either partially dutiable under 807 or some of the items free as returned American goods" (R. 65).

It is well settled law that free entry of merchandise as American goods returned is available to the importer only upon compliance with applicable regulations unless such compliance is waived. *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937); *Dulien Steel Products, Inc., of Calif., W. J. Byrnes & Co., Inc.* v. *United States*, 40 Cust. Ct. 113, C.D. 1969 (1958); *McDonnell Douglas Corp.* v. *United States*, 75 Cust. Ct. 6, 14, C.D. 4604 (1975), *decided on rehearing* 78 Cust. Ct. 92, C.D. 4692 (1977).

In *Maple Leaf Petroleum* our appeals court in considering paragraph 1615, Tariff Act of 1930, the predecessor provision to TSUS item 800.00, and article 392 of the Customs Regulations of 1931, which provided that certain documents be filed in connection with free entry of American goods returned, *held* that valid customs regulations made in pursuance of law have the force and effect of law and must be complied with as an act precedent to obtaining any special grant to which such regulations relate unless, in accordance with regulations, compliance therewith has been waived. The court made the following comment at 8–9:

> Appellant's argument to the effect that the collector knew all the facts, and that for this reason the establishment of the identity of the merchandise exported and imported in accordance with the regulations was therefore unimportant, is devoid of merit. It has long been the sound policy of our Government that when such grants and privileges as those involved here were allowed in customs matters, they were granted only upon the condition that there should be a compliance with regulations to be prescribed by the Secretary of the Treasury. The party asking the special grant or favor, of course, would be required to make a showing of the essential facts required by the regulation to the collector at the time of entry and not in the way of evidence at some subsequent trial.

The applicable regulations of the Secretary of the Treasury for American goods returned were promulgated pursuant to several express provisions of TSUS, notably general headnote 11, and headnote 1 to schedule 8, which provide:

General Headnotes and Rules of Interpretation

* * * * * * *

11. Issuance of Rules and Regulations. The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the schedules. The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide for total or partial relief from duty or other import restrictions on the basis of facts which are not determinable from an examination of the article itself in its condition as imported, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

Schedule 8 headnote:

1. The provisions of this schedule are not subject to the rule of relative specificity in headnote 10(c) of the General Headnotes and Rules of Interpretation, and, except as provided in headnote 3 to part 1 of this schedule, any article which is described in any provision in this schedule is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.

In support of its case, plaintiff called five witnesses and offered in evidence four exhibits, all of which were admitted. Defendant relied solely on documentary evidence, introducing four exhibits, two of which were admitted.

The exhibits received in behalf of plaintiff are the following:

Exhibit 1: Customs form RC–1–24, Missing Document Receipt, dated December 26, 1972. This exhibit indicates that the foreign shippers declaration and the certificate of exportation were missing with respect to entry No. 02469. The reason for issuance of this form is given as "Canceled."

Exhibit 2: Customs form RC–1–24, also dated December 26, 1972, contains information identical to exhibit 1 but relates to entry No. 03450.

Exhibit 3: Memorandum dated January 29, 1969, signed by C. J. Ahern, Assistant District Director of Customs (C&V), Boston, Mass., captioned "Missing Documents—Effective May 28, 1968."

Collective exhibit 4: Copies of customs form 5561, "Notice of Action and/or Request for Information." Notices are dated December 1, 1971, December 17, 1971 and December 12, 1972. The notice of December 17, 1971 states that it supersedes and cancels notice of action dated December 1, 1971.

The following exhibits were received in behalf of the defendant:

Exhibit A: Letter of April 2, 1971 from Air-Sea Brokers, Inc. to the district director. This exhibit attached to entry No. 03450, states in pertinent part that the merchandise consists of parts which had been sent to Syma International, S.A., the manu-

facturers' representative overseas for H. H. Scott, Inc., and while these parts were in the possession of Syma they were assembled in order to facilitate the repair of the H. H. Scott equipment. This same information had been furnished by letter dated January 29, 1971 covering entry No. 02469.

Exhibit D: Memorandum of December 3, 1971 from Air-Sea Brokers, Inc., to H. H. Scott setting forth the estimated amount of duties on entry Nos. 02469, 03450 and 03895.

Defendant also introduced into evidence exhibits B and C for identification in order to establish the foreign origin of some of the assembled items. The documents and their purpose were described at the trial when the defendant's offer of proof was made:

> MR. POLITIS: Your Honor, these are documents submitted by the plaintiff to the Customs Service regarding certain electrical parts, capacitators, conductors and so on and on these particular data sheets which were submitted to the Customs Service, the plaintiff has indicated the country or origin as to some of the components. Some of them Japan, others Hong Kong and, the purpose of admitting these documents into evidence is to compare that to some of the items which are on this particular entry and to show that plaintiff was not entitled to 800 treatment as to the entry. That's the purpose of my offer of proof. * * * [R. 62.]

At the trial plaintiff's counsel objected to the introduction of the aforementioned exhibits on the grounds of relevancy and surprise. The court reserved ruling on their admission into evidence (R. 63).

Three of plaintiff's witnesses testified pursuant to subpoena: Barbara Hutchins, import specialist at the Boston district; Paul A. Leonard, import specialist and team leader, who was Mrs. Hutchins' supervisor; Ruth M. Mitchell, customs liquidator at Boston. The remaining two witnesses were James E. Francis, Jr., treasurer of plaintiff corporation, and Michael Mayzel, president of A & M Customs Brokers Company, located in Boston.

Exhibits B and C for identification consist of two letters dated September 23, 1970 to the district director at Boston, on the letterhead of Air-Sea Brokers, Inc. and bear the signature (without title) of J. E. Francis, Jr. Attached thereto are material cost sheets covering items stated to have been assembled in Hong Kong.

Plaintiff's objections, made either at the trial or in its briefs, claim the documents are not relevant; that plaintiff was prejudiced by surprise and denied an opportunity to question defendant's witnesses with respect to these exhibits at the time certain depositions were taken at the offices of plaintiff's counsel in Boston; that these documents were not produced pursuant to the court's discovery order entered on February 27, 1976; that the exhibits in issue referred only to one entry, i.e., entry No. 01252; that defendant did not lay a proper

foundation to show that Mr. Francis had personal knowledge of the facts contained in the letters; that neither defendant's cross-examination of the witness at the trial nor defendant's offer of proof established personal knowledge of the contents with respect to the importations. Plaintiff further contends the exhibits are of limited evidentiary value.

The letters, written by plaintiff to Customs, are relevant inasmuch as the material cost sheets attached thereto show certain part numbers which are also found on the invoice for entry No. 01252. It is desirable that facts be adduced which might have a bearing on the issues before the court. The probative value of the evidence proffered outweighs any objections heretofore raised. Exhibits B and C for identification fall within the category of admissions which may be introduced into evidence.[2] These documents meet the criterion established by Rule 401, Federal Rules of Evidence, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence admissible under the rules of evidence applicable in the courts of the United States are admissible in the Customs Court. Rule 10.4(a) of the rules of this court so provides. Accordingly, exhibits B and C for identification are admitted into evidence.

The regulations affecting classification of American goods returned are set forth in section 10.1(a) of the Customs Regulations. Basically, these regulations require documentation of the American origin of the importations by the importer at the time of entry, who is required to file (1) the foreign shipper's declaration, (2) the declaration of importer on customs form 3311, and (3) a certificate of exportation. None of these were filed.

Compliance with section 10.1(a) is mandatory and a condition precedent to recovery unless compliance has been waived or is impossible. *Maple Leaf Petroleum, Ltd.* v. *United States, supra; Mine Safety Appliances Company* v. *United States*, 36 Cust. Ct. 277, C.D. 1786 (1956). The basis for waiver of the required documentation is predicated on the district director being satisfied by the production of other evidence as to the American origin of the merchandise and its eligibility under TSUS item 800.00. If the district director is not satisfied, he cannot waive the documentation requirements of the regulations.

The record clearly shows the customs officials were not satisfied that all of the merchandise was of United States origin. They were

[2] See *W.T. Grant Company* v *United States*, 38 CCPA 57, C.A.D. 440 (1950), wherein our appeals court in discussing the rules of evidence applicable in classification cases stated: "Admissions by a party, of course, may be introduced into evidence against him by his party opponent. 4 Wigmore on Evidence (3d Ed.) Sec. 1048; 1 Jones on Evidence (4th Ed.) section 236."

also of the opinion that some assembly had taken place which would disqualify the entries from item 800 treatment. Those facts were conveyed to plaintiff.

Import specialist Hutchins, who had written the statements of appraisement and classification with respect to entry Nos. 03450 and 02469 and had done the preliminary background work in determining some of the components involved, with respect to entry No. 01252, testified that a customs inspector examined the merchandise. If he found evidence the goods were of foreign origin, she explained, there would be a notation to that effect. She found no such notation. Her testimony on cross-examination was that no country of origin was indicated:

> A. 01252. There is a notation by the inspector that the country of origin was not indicated. On entry 03450, there is a notation, "Merchandise marked H. H. Scott, Inc. No country of origin indicated." And, on 02469 there is a notation of no evidence of country of origin. [R. 36–37.]

Mrs. Hutchins stated that she had made it clear to Mr. Francis of Air-Sea Brokers, Inc. that duties would be assessed on the three entries. The following colloquy with Government counsel ensued (R. 37–40):

> Q. Now, you indicated also on direct examination that you had a conversation with Mr. Francis of Air-Sea Brokers, is that correct?—A. Yes, sir.
>
> Q. During the course of your conversation, was it made clear to Mr. Francis by you that the duties would be assessed on these particular entries?
>
> * * * * * * * *
>
> THE WITNESS: Yes.
>
> Q. And how do you recall this conversation that took place in the latter part of 1972?—A. The fact that he mentioned Congressional legislation to alleviate the problem of paying duties for a bankrupt company. I never heard of it before.
>
> * * * * * * * *
>
> Q. Now, in your conversation with Mr. Francis, did you indicate to him that duties would be assessed on these entries?—A. To the best of my recollection, yes.
>
> * * * * * * * *
>
> Q. And, of course, the 5561 was addressed to Air-Sea Brokers, the plaintiff in this case.—A. Yes.
>
> Q. Was it in response to this form that Mr. Francis came and talked to you at a subsequent time?—A. Yes.
>
> Q. Did you intend at any time to waive the requirement of the documentation?—A. No.

Import specialist Leonard testified that he had examined the three entries and was familiar with them and had rejected the claim for

entry under item 800.00. As to entry No. 01252, which he handled, he stated the word "Japan" was listed after certain of the parts indicating "that when Mrs. Hutchins checked the invoice with a print-out sheet that was made by Air-Sea Brokers to a previous import specialist that that particular part number is, by his admission, of Japanese origin" (R. 56). The witness identified exhibits B and C, which were submitted to the Customs Service by the importer, as documents kept in his office in the ordinary course of business in the customhouse. He described the purpose of the documents as follows:

> * * * a duplication of similar built merchandise where they were disclosing certain components in the assembly to be of foreign origin as well as U.S. components. [R. 58.]

Mr. Leonard further testified that notations on the invoices with respect to assembly costs for certain components indicated the goods were improved or advanced and, therefore, were not entitled to "800 treatment."

On cross-examination Mr. Leonard stated he had possibly two conversations with Mr. Francis, one in December 1972. One of the conversations resulted from Customs sending a notice of action form (form 5561). The pertinent portion of the record reads as follows:

> Q. Can you recall the essence of the conversation you had with Mr. Francis?—A. Mr. Francis asked if it was Customs' intention to make the entries dutiable and we said we were making it dutiable unless he came up with evidence that would warrant us changing our minds and making the entries either partially dutiable under 807 or some of the items free as returned American goods. We would need documentation and evidence.
>
> Q. Did Mr. Francis indicate to you whether or not he could provide that documentation?—A. He said he was not concerned because of some Congressional legislation that was going to be put forth and, based on that, we decided we would go forward with our action.
>
> * * * * * * * *
>
> Q. And did you tell Mr. Francis that the Customs Service was going to assess duties on these entries?—A. With the 5561 we told him that it was going to be made dutiable and when he came into the office and told us that he could no longer get any more documentation or evidence and that he was going to go through another source, Congressional legislation, we just said we will go ahead with our action. We wanted to give him as much opportunity as possible to provide the evidence of documentation. [R. 65–66.]

The record further shows it was the opinion of customs brokers Francis and Mayzel that when the word "Canceled" is set forth on a missing document receipt it indicates there is nothing further to do. Both stated if Customs was going to assess duty it should have added

a notation of noncompliance, duty to be assessed, to customs form RC–1–24. Admittedly, Customs violated its own regulations in this respect. Import specialist Hutchins and her supervisor, Paul Leonard, conceded the forms were incorrectly filled out and should have included the additional language "Duty Assessed – Noncompliance CR" as required by the customs district of Boston in its regulations pertinent to waiver of documents. (Exhibit 3.) In light of the record presented the court can in no way construe the actions of the customs officials to be a waiver. It is clear Customs did not intend to waive the required documents, inasmuch as it was not satisfied the merchandise was of American origin and had not been advanced in value while abroad.

The mere fact plaintiff was a customs broker and not the actual importer of the merchandise and, as such, would not possess firsthand knowledge of the facts concerning the importations, does not of itself sanction the free entry of so-called American goods without the production of other satisfactory evidence as to the identity thereof. See *Madeline Britton, V. A. Lessor & Co.* v. *United States*, 29 Cust. Ct. 314, C.D. 1485 (1952) on the issue of impossibility of compliance with mandatory customs regulations.[3]

Plaintiff has not satisfied the documentary requirements of section 10.1 of the Customs Regulations. Compliance was neither waived by the customs officials nor did plaintiff establish impossibility of compliance. The regulations require the district director be satisfied as to the American origin of the merchandise, and plaintiff cannot create a right of recovery that does not exist by invoking the doctrine of equitable estoppel.

On the record before us, it appearing the district director was not satisfied the merchandise was entitled to free entry under TSUS item 800.00, this action must be dismissed.

Judgment will be entered accordingly.

(C.D. 4743)

J. E. Bernard & Co., Inc. *v.* United States

Cellulosic plastics tubing—Regulations

The obligation of an importer to comply with regulations prescribed by the Bureau of Customs pursuant to statutory actual use

[3] That case discusses an extreme situation. Evidence had been adduced for the purpose of establishing that goods claimed to have been of American manufacture were imported through the same port as exported. Export records purported to have been filed at the customhouse had been destroyed. The court held that impossibility of compliance did not of itself sanction free entry of the merchandise.

provisions held not dispensed with because of a customs ruling which was later revoked.

Court Nos. 70/55522, etc.

Port of Chicago

[Judgment for defendant.]

(Decided May 23, 1978)

Barnes, Richardson & Colburn (*James S. O'Kelly, Edward F. Christopher,* and *Michael A. Johnson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss,* trial attorney), for the defendant.

MALETZ, Judge: In these 24 consolidated cases the court is called upon to determine the proper classification of certain plastic cuprophan tubing which was exported from Germany, Belgium and France and entered at the port of Chicago between May 1969 and March 1972. Plaintiff is a customhouse broker which entered the merchandise for the account of Travenol Laboratories, Inc. The initial shipments of merchandise were classified by Customs under item 772.65 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9, as tubing of plastics, suitable for conducting liquids or gases and assessed duty at the rates of 6.5% ad valorem in 1969 and 5.5% ad valorem in 1970; later Customs classified the merchandise under item 771.35, as modified by T.D. 68–9, as other seamless tubing of cellulosic plastics materials and assessed duty at rates ranging from 14¢ per pound in 1970 to 10¢ per pound in 1972.

Plaintiff claims that the merchandise is properly classifiable under item 854.20 which provides for the free entry of cellulosic plastics materials imported for use in artificial kidney machines or apparatus by a hospital or patient pursuant to a physician's prescription.

The pertinent statutes read as follows:

Tariff Schedules of the United States

GENERAL HEADNOTES AND RULES OF INTERPRETATION

* * * * * * *

10. General Interpretative Rules. For the purposes of these schedules—

* * * * * * *

(e) in the absence of special language or context which otherwise requires—

* * * * * * *

(ii) a tariff classification controlled by the actual use to which an imported article is put in the United States is satisfied

only if such use is intended at the time of importation, the article is so used, and proof thereof is furnished within 3 years after the date the article is entered;

* * * * * * *

Classified under:

Schedule 7, Part 12:

* * * * * * *

Film, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics:

Of cellulosic plastics materials:

* * * * * * *

Other:

* * * * * * *

771.35	Other	14¢ per lb. [1970] 12¢ per lb. [1971] 10¢ per lb. [1972]

* * * * * * *

772.65	Hose, pipe, and tubing, all the foregoing not specially provided for, of rubber or plastics, suitable for conducting gases or liquids, with or without attached fittings	6.5% ad val. [1969] 5.5% ad val. [1970]

Claimed under:

Schedule 8:

Schedule 8 headnote:

1. The provisions of this schedule are not subject to the rule of relative specificity in headnote 10(c) of the General Headnotes and Rules of Interpretation, and, except as provided in headnote 3 to part 1 of this schedule, any article which is described in any provision in this schedule is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.

* * * * * * *

Part 4:

* * * * * * *

854.20	Cellulosic plastics materials imported for use in artificial kidney machines or apparatus by a hospital or by a patient pursuant to prescription of a physician	Free

The following pertinent regulations were issued by the Secretary of the Treasury (T.D. 71-139, 36 F.R. 10726, June 2, 1971, effective July 2, 1971):

RATE OF DUTY DEPENDENT UPON ACTUAL USE

10.131 Circumstances in which applicable.—The provisions of sections 10.131 through 10.139 are applicable in those circumstances in which the rate of duty applicable to merchandise is dependent upon actual use, unless there is a specific provision in this part or Part 54 of this chapter which governs the treatment of the merchandise. * * *

* * * * * * *

10.133 Conditions required to be met.—When the tariff classification of any article is controlled by its actual use in the United States, three conditions must be met in order to qualify for free entry or a lower rate of duty unless the language of the particular item of the Tariff Schedules of the United States applicable to the merchandise specifies other conditions. The conditions are that:

(*a*) Such use is intended at the time of importation.

(*b*) The article is so used.

(*c*) Proof of use is furnished within 3 years after the date the article is entered or withdrawn from warehouse for consumption.

10.134 Declaration of intent.—A showing of intent by the importer as to the actual use of imported merchandise shall be made by filing with the entry for consumption or for warehouse a declaration as to the intended use of the merchandise, or by entering the proper item number of an actual use provision of the Tariff schedules of the United States and the reduced or free rate of duty on the entry form. Entry made under an actual use provision of the Tariff Schedules of the United States may be construed as a declaration that the merchandise is entered to be used for the purpose stated in the schedules, provided the district director is satisfied the merchandise will be so used. However, the district director shall require a written declaration to be filed if he is not satisfied that merchandise entered under an actual use provision will be used for the purposes stated in the schedules.

* * * * * * *

10.136 Suspension of liquidation.—Liquidation of an entry covering merchandise for which a declaration of intent has been made pursuant to §10.134 and any required deposit of duties made, shall be suspended until proof of use is furnished or the 3-year period allowed for production thereof has expired.

* * * * * * *

10.138 Proof of use.—Within 3 years from the date of entry or withdrawal from warehouse for consumption, the importer shall submit in duplicate in support of his claim for free entry or for a reduced rate of duty a certificate executed by (1) the superintendent or manager of the manufacturing plant, or (2) the individual end-user or other person having knowledge of the actual use of the imported article. The certificate shall include a description of the

processing in sufficient detail to show that the use contemplated by the law has actually taken place. A blanket certificate covering all purchases of a given type of merchandise from a particular importer during a given period, or all such purchases with specified exceptions, may be accepted for this purpose, provided the importer shall furnish a statement showing in detail, in such manner as to be readily identified with each entry, the merchandise which he sold to such manufacturer or end-user during such period.

* * * * * * *

The cases have been submitted for decision on the basis of the following stipulation:

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the parties, subject to approval of this Court, as follows:

1. The actions enumerated on the attached Schedule of Cases may be consolidated for purposes of submission, decision and judgment.

2. These actions were commenced within the time provided by law, and all liquidated duties have been paid.

3. The imported merchandise consists of plastic tubing, known as "Cuprophan" tubing, and was entered at the port of Chicago, Illinois, on the dates shown on the attached Schedule of Cases. Each of the entries was liquidated by the District Director on the date shown on the Schedule.

4. The tubing was classified and assessed with duty by the District Director under either TSUS item 772.65 as tubing, n.s.p.f., of plastics, suitable for conducting liquids or gases, or under TSUS item 771.35 as other seamless tubing of cellulosic plastics materials.

5. Plaintiff contends that the tubing is properly classifiable under TSUS item 854.20, free of duty, as cellulosic plastics materials imported for use in artificial kidney machines or apparatus by a hospital or a patient, pursuant to a physician's prescription.

6. The tubing was imported by plaintiff, J. E. Bernard & Co., Inc., as customs broker for Travenol Laboratories, Inc. With respect to the cases on the attached Schedule the parties agree that:

(a) Entries marked "A" on the attached Schedule were entered by plaintiff at the free rate of duty.

(b) Entries marked "B" on the attached Schedule were liquidated by Customs as entered by plaintiff, under the provisions recited in paragraph 4. However, notations by plaintiff on the entry papers indicate that a claim of free entry under "TSUS 854.0000" might be made.

(c) Entries marked "C" were liquidated by Customs as entered by plaintiff, under the provisions recited in paragraph 4. However, commercial invoices accompanying the entry papers state that the merchandise is for kidney machines in accordance with the duty free provisions of "854.00, TSUS."

(d) Entries marked "D" were liquidated as entered by plaintiff. There are no notations on either the entry papers or the accompanying commercial invoices indicating that duty free entry was intended.

(e) Entries marked "E" were liquidated as entered by plaintiff. There are no notations on either the entry papers or the accompanying commercial invoices that duty-free entry was intended. However, a rejected entry attached to the entry papers indicated plaintiff's attempt to have merchandise entered under the provisions listed in subparagraph (a).

(f) Entries marked "F" were liquidated as entered by plaintiff. There are no notations on either the entry papers or the accompanying commercial invoices indicating that duty free entry was intended. However, an internal Customs memorandum from the Assistant District Director of Chicago to the Deputy Assistant Regional Commissioner (C & V) states:

"Issue classification: 854.20/Free vs. 771.35/14¢ 772.65/5 1/2%."

Plaintiff contends that this memorandum indicates Customs' awareness of the classification issue involved in the entries marked "F." Defendant denies that contention.

7. A kidney coil is a hemodialysis device used to treat patients suffering from acute renal failure.

8. A kidney coil is a "prescription device" within the meaning of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301, *et seq.*) and regulations of the Food and Drug Administration promulgated thereunder (21 C.F.R. 1.1, *et seq.*), which law and regulations restrict the distribution of such devices in the United States to hospitals or to patients pursuant to a prescription of a physician.

9. The imported merchandise, Cuprophan tubing, was manufactured into kidney coils in the United States.

10. On March 17, 1971, a Customs Ruling was promulgated, which is attached as Exhibit 1. On July 2, 1971, §§ 10.134, 10.136 and 10.138 of the Customs Regulations became effective.

11. On October 17, 1974, defendant's counsel advised plaintiff's counsel that the Government had reviewed its interpretation of item 854.20 and changed its position with respect to the issue of the proper tariff classification of merchandise described in paragraph 4 of Exhibit 1. Thereafter, the Government agreed that importations by plaintiff of such tubing would qualify for free entry under item 854.20, provided declarations of intent and certificates of actual use were filed as required by General Headnote 10(e)(ii), TSUS.

12. On February 11, 1975, Travenol filed Certificates of Actual Use of the Tubing with the District Director, copies of which are attached as Exhibit 2, relating to all the subject entry numbers with the exception of entry 201226 of Civil Action 72–2–00446 and entry 227220 of Civil Action 72–8–01856.[1]

13. With the exception of entries 226668, 227220, and 228713 of Case No. 72–8–01856, all of the entries covered by the Certificates of Actual Use were made more than three years prior to February 11, 1975.

* * * * * * *

[1] A review of the entry papers shows that there is no entry 227220 involved in the actions before us. There is, however, an entry number 227200 for which a timely certificate of actual use was filed. It appears that entry 227200 was erroneously listed on the Schedule of Cases, attached to the stipulation, as 227220. This discrepancy explains the inconsistency between paragraphs 12 and 13 with respect to entry 227220.

The 24 consolidated cases here involved cover 81 entries and all these entries were liquidated as entered. However, protests were filed on 19 entries which were liquidated on or before September 4, 1970 claiming that the imported tubing was properly classifiable as seamless tubing of cellulosic acetate materials under item 771.20 rather than under item 772.65 (which covers tubing of plastics, suitable for conducting liquids or gases) on the ground that item 771.20 is more specific than item 772.65. The claims for duty-free entry under item 854.20 were interposed subsequent to the liquidation of these 19 entries and thus after September 4, 1970. In addition protests and complaints were filed on the remaining 62 entries claiming that the imported tubing should be entered duty free under item 854.20 on the basis that such tubing was solely used with artificial kidney machines.

The claims for duty-free entry under item 854.20 were denied pursuant to a customs ruling embodied in a letter from the Director, Division of Tariff Classification Rulings of the Bureau of Customs, dated March 17, 1971 (stipulation, par. 10, exhibit 1), which reads in part as follows:

> There is no requirement that materials entered under item 854.20, TSUS, be imported directly by a hospital or patient. The prohibition against commercial use is not violated when, on prior order, a distributor or other middleman orders from abroad and imports the materials as agent of the hospital or patient, and so states on the entry papers. The fact that the middleman or distributor is remunerated for his services and the material in these circumstances does not render the transaction commercial.
>
> Free entry for cellulosic plastics materials under item 854.20, TSUS, will be denied when the materials are imported by a distributor or other middleman as a "shelf" item, in hopes of later sales. The fact that such hoped for "later sales" may be sales to hospitals or their patients would not alter the dutiable status of shelf cellulosic plastics materials.

On October 17, 1974, government counsel advised plaintiff's counsel that the government had reviewed its interpretation of item 854.20 and changed its position with respect to the issue of the proper tariff classification of cellulosic plastics materials imported by a distributor or other middleman as a "shelf" item. Thereafter, the government agreed that importations by plaintiff of such tubing would qualify for free entry under item 854.20, provided declarations of intent and certificates of actual use were filed as required by general headnote 10(e)(ii), TSUS.

On February 11, 1975, Travenol filed certificates of actual use of the tubing with the district director covering 80 of the 81 entries (see note 1, *supra*). With the exception of three entries, all of the

entries covered by the certificates of actual use were made more than three years prior to February 11, 1975.

Against this background, the question is whether under the circumstances of the present cases plaintiff is entitled to duty-free classification under item 854.20 notwithstanding that it failed to comply with statutory and regulatory conditions precedent for such classification.

General interpretative rule 10(e)(ii) and customs regulation 10.133 make it clear that an actual use provision such as item 854.20 is satisfied only (1) if such use is intended at the time of importation; (2) if the article is so used; and (3) if proof thereof is furnished within three years after the date the article has been entered.

Item 854.20 requires that imported cellulosic plastics materials be used in artificial kidney machines or apparatus by a hospital or by a patient pursuant to a prescription by a physician. The actual use of the merchandise at bar, i.e., plastic tubing known as cuprophan tubing, is not in dispute since the parties have stipulated that the tubing was manufactured in the United States into kidney coils which are hemodialysis devices used to treat patients suffering from acute renal failure. But even though a product is actually used in the manner contemplated by an actual use provision, it may be classified under that provision only if the mandate of general interpretative rule 10(e)(ii) has been complied with. *Czarnikow-Rionda Company* v. *United States*, 66 Cust. Ct. 431, C.D. 4229, 328 F. Supp. 487 (1971), *aff'd*, 60 CCPA 6, C.A.D. 1071, 468 F. 2d 211 (1972). Thus, the timely filing of certificates of actual use is as much a requirement for classification under an actual use provision as proof of the actual use itself.

It is in this context that we consider first the requirement of rule 10(e)(ii) that certificates of proof of actual use must be furnished three years from the date of entry. And, on this score, it is important to note that with the exception of three entries plaintiff has not complied with this three-year requirement. However, plaintiff argues that it was not required to file certificates of actual use within three years from the date of entry on the ground that the government assertedly waived this requirement. According to plaintiff, this waiver occurred when Customs (1) allegedly refused to recognize the importer's status as a proper party to seek duty-free entry; and (2) failed to suspend liquidation of the entries.

With regard to the first aspect of this argument, namely that Customs allegedly refused to recognize the importer's status as a proper party to seek duty-free entry, plaintiff relies on the customs ruling of March 17, 1971. The import of that ruling is that in order to qualify for free entry (1) the article does not have to be imported directly by a hospital or patient; (2) that duty-free entry will be allowed when,

on prior order, a distributor or other middleman orders from abroad and imports the materials as agent of the hospital or patient and so states on the entry papers; and (3) that free entry will be denied when the materials are imported by a distributor or other middleman as a "shelf" item, in hopes of later sales. In view of this ruling, plaintiff relying heavily on *Tacey* v. *Irwin*, 85 U.S. 549 (1873) insists that filing certificates of actual use would have been a vain and useless act and the law does not require the performance of a vain and useless act.

A similar argument was rejected in *Border Brokerage Co. et al.* v. *United States*, 19 Cust. Ct. 55, C.D. 1067 (1947), *aff'd*, 36 CCPA 83, C.A.D. 402 (1949). In that case the court held that the obligation of importers to comply with regulations prescribed by the Secretary of the Treasury under a statute requiring the filing of affidavits of intended use and of actual use were not dispensed with because of an additional regulation—later held invalid—which would have resulted in rejection of the importer's claim. In other words, compliance with the regulations requiring the filing of affidavits was necessary even though the collector's office was rejecting the claims. The court in *Border Brokerage* distinguished *Tacey* v. *Irwin* as follows (19 Cust. Ct. at 58):

> Plaintiffs claim, however, that the law does not require the performance of useless acts, citing *Tacey* v. *Irwin*, 85 U.S. 549. In that case, tax commissioners had issued a general rule refusing to receive taxes unless tendered by the owner of the property in person. After the premises in question were advertised for sale, a relative of the owner went to the office of the commissioners to see about the payment of the tax but did not make a formal offer of payment. It was held that the owner had a right to pay in person or through any one not disavowed by him; that this right had been denied by the rule adopted by the commissioners; that the general rule had the effect of a refusal to accept a tender made by some one other than the owners; and that because of such rule a regular tender was excused.
>
> That case can be distinguished from the instant case in that the very regulation which was not complied with was declared invalid and the payment itself would have been refused, if tendered. In the instant case, the regulations requiring the filing of affidavits of use are reasonable and valid and there is no evidence that the collector would have refused to accept those affidavits, if tendered.

Here not only were the customs regulations requiring the filing of certificates of actual use reasonable, they were statutorily mandated. Moreover, there is no evidence whatever that Customs would have refused plaintiff's tender of such certificates considering especially that plaintiff's standing as a proper party is without dispute. Indeed, this is emphasized by Customs' acceptance of later certificates of actual use filed by plaintiff notwithstanding that they were in fact untimely.

To paraphrase what the court said in *Border Brokerage* (19 Cust. Ct. at 61): It cannot be said that the filing of the certificates of actual use is an entirely useless act. Although Customs ruled on March 17, 1971 that the merchandise herein was not entitled to free entry under item 854.20, Customs had 90 days after the filing of a protest to the liquidations in which to review its ruling. Had the ruling been rescinded during that period, Customs would have reconsidered its decision; but without any certificates of actual use before it, Customs would not have known whether the merchandise had been used as coils in kidney machines and so could not have changed its ruling. See also, e.g., *Harris & Co. et al.* v. *United States*, 6 Ct. Cust. Appls. 420, T.D. 35978 (1915); *S. Schapiro & Sons* v. *United States*, 29 CCPA 235, C.A.D. 196 (1942); *Pink Supply Co.* v. *United States*, 32 CCPA 48, C.A.D. 284 (1944).

What is more, even assuming *arguendo* that Customs knew the imported tubing had only one possible use in the United States, i.e., for kidney machines, plaintiff still would not have been relieved from the necessity of complying with the conditions mandated by general interpretative rule 10(e)(ii). This is made clear in *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937) where it was held that the importer was not excused from filing documents required by the regulations, although the collector knew all the facts in the case. As the court in *Maple Leaf* stated (*id.* at 8–9):

> Appellant's argument to the effect that the collector knew all the facts, and that for this reason the establishment of the identity of the merchandise exported and imported in accordance with the regulations was therefore unimportant, is devoid of merit. It has long been the sound policy of our Government that when such grants and privileges as those involved here were allowed in customs matters, they were granted only upon the condition that there should be a compliance with regulations to be prescribed by the Secretary of the Treasury. * * *

For the foregoing reasons, it must be concluded that the customs ruling of March 17, 1971 did not excuse plaintiff from filing timely certificates of actual use.

The second aspect of plaintiff's argument is that Customs waived the filing of certificates of actual use because it failed to withhold liquidation for a three-year period to determine whether the items imported by plaintiff were in fact delivered to hospitals or patients for use in kidney machines.

Customs regulation 10.136 deals with suspension of liquidation for merchandise for which a declaration of intent has been made pursuant to customs regulation 10.134. These regulations became effective July 2, 1971 on which date 68 of the 81 entries involved here had

already been entered and thus only 13 of the entries could have been eligible for suspended liquidations under 10.136.

With respect to the 68 entries made before July 2, 1971, customs regulation 25.18(b) (19 C.F.R. § 25.18(b) (1970)) was the precursor regulation to regulation 10.134. It provided as follows:

> (b) In cases where the regulations relating to certain classes of merchandise * * * prescribe a 3-year period within which proof must be produced of the use or disposition of the merchandise in, or its exportation from, the United States, and such proof is not furnished within the prescribed period, the collector may, upon the written application of the importer, extend the 3-year period for further periods of 1 year each, but not to exceed 5 years from the date of entry.

Under this regulation, plaintiff had three years within which to file proof of use—which it did not do with respect to the 68 entries. Nor did plaintiff file a written application—or any application for that matter—requesting an extension of time for filing such proof. In these circumstances, it is manifest that as to these 68 entries plaintiff has failed to comply with the applicable regulation.

We turn next to the 13 entries which were made after July 2, 1971—the date on which customs regulation 10.136 became effective. As previously noted, this regulation reads as follows:

> *10.136 Suspension of liquidation.*—Liquidation of an entry covering merchandise for which a declaration of intent has been made pursuant to § 10.134 and any required deposit of duties made, shall be suspended until proof of use is furnished or the 3-year period allowed for production thereof has expired.

Also, as previously noted, customs regulation 10.134 covering declarations of intent reads as follows:

> *10.134 Declaration of intent.*—A showing of intent by the *importer* as to actual use of imported merchandise shall be made by filing with the entry for consumption or for warehouse a declaration as to the intended use of the merchandise, or by entering the proper item number of an actual use provision of the Tariff Schedules of the United States and the reduced or free rate of duty on the entry form. Entry made under an actual use provision of the Tariff Schedules of the United States may be construed as a declaration that the merchandise is entered to be used for the purpose stated in the schedules, provided the district director is satisfied the merchandise will be so used. However, the district director shall require a written declaration to be filed if he is not satisfied that merchandise entered under an actual use provision will be used for the purposes stated in the schedules. [Emphasis added.]

With respect to regulations 10.136 and 10.134, the parties have stipulated, as follows, as to the 13 entries entered after July 2, 1971 (the effective date of these regulations): (1) that the entries marked "C" have accompanying commercial invoices which state that the

merchandise is for kidney machines in accordance with the duty-free provisions of item 854.20; (2) that the entries marked "D" have no notations on the entry papers or the accompanying commercial invoices indicating duty-free entry was intended; and (3) that for entries marked "E" there are no notations on either entry papers or the accompanying commercial invoices that duty-free entry was intended but that a rejected entry attached to the entry papers indicated plaintiff's attempt to have the merchandise entered under item 854.20.

It is to be further observed that with regard to the 13 entries in question, 11 came under the category marked "C"; one under "D"; and one under "E."

Considering first the entries marked "C," plaintiff neither entered the merchandise covered by these entries under item 854.20 nor filed a separate declaration of intent. And nowhere did the *importer* indicate that either it or the commercial purchaser intended that the merchandise be used in the way specified by item 854.20. Regulation 10.134 clearly states that the showing of intent should be made by the "importer," yet the only intent that was recorded was on the commercial invoices by the exporter who had no control of the merchandise at or after the time of entry. Since no declaration of intent as required by regulation 10.134 was filed, Customs was not obligated to withhold liquidation.

With regard to the entry marked "D," the parties have stipulated that no notations appear anywhere indicating that the importer intended to have the merchandise entered duty free. Therefore, Customs was correct in not withholding liquidation and in classifying the merchandise as entered.

Finally, the entry marked "E" does have a rejected entry attached to the entry papers indicating plaintiff's intent to have the merchandise entered duty free under item 854.20. However, regulation 10.134 explicitly states that the district director shall require a written declaration of intent to be filed if he is not satisfied that merchandise entered under an actual use provision will be used for the purposes stated in the tariff schedules. Since the district director apparently rejected the entry under item 854.20, it was incumbent upon plaintiff to file a written declaration of intent pursuant to regulation 10.134. And since plaintiff failed to file such a declaration, Customs again was not required to suspend liquidation.

Headnote 1, Schedule 8, TSUS, makes compliance with "any applicable regulations" a prerequisite for classification within that schedule. In light of the fact that plaintiff failed to file declarations of intent as required by regulation 10.134 it is precluded by headnote 1 from obtaining classification for the 13 entries under the duty-free provisions of item 854.20 which is a schedule 8 item.

Apart from the foregoing, regulation 10.136 requires suspension for which a declaration of intent has been made "until proof of use is furnished *or the 3-year period allowed for production thereof has expired.*" (Emphasis added.) For 78 of the 81 entries, proof of actual use was *not* furnished within the requisite three-year period. Thus, the regulation itself on which plaintiff's waiver argument is predicated is inapplicable since suspension in any case could not extend beyond the three-year period.

Deserving mention is yet another facet of suspension of liquidation which pertains to the 78 entries where timely certificates of use were not filed. For even assuming that liquidation of these entries should have been suspended, the instant regulations could not lawfully relieve plaintiff of its statutory obligations under general interpretative rule 10(e)(ii). Relevant in this connection is the *Czarnikow* case, *supra*, where plaintiff argued that customs regulations relating to the release of merchandise without additional duties (66 Cust. Ct. at 437, note 6) modified the requirements of rule 10(e)(ii). The appellate court rejected this contention (60 CCPA at 9):

> Although appellant cites various Customs Regulations in arguing against Rule 10(e)(ii) as a mandatory requirement for the filing of proof of further processing within 3 years of the time of importation we find no provision within the tariff statute itself which might modify the responsibility placed on the importer. *Customs Regulations can not be elevated to the level of statutory authority. Moreover, had the importer furnished timely proof, it would have avoided the additional duty. We see no inequity in holding the importer to the mandatory limit.* [Emphasis added.]

In *Czarnikow*, the government had granted plaintiff an extension of time to file certificates of actual use (60 CCPA 9, note 3). The appellate court held that such purported extension was ineffective, since Customs was without authority to extend the three-year statutory limit. *A fortiori* in the present cases where there is no indication whatever in the record that Customs even contemplated the granting of an extension to plaintiff, there can be no estoppel against the government. In short, plaintiff cannot prevail because it has not complied with the requirements of the statute which set a three-year time limit. And this statutory limitation was neither extended by Customs nor could it be extended. *Cf.* customs regulation 25.18(b) (19 C.F.R. § 25.18(b) (1970)), *supra*.

Remaining for consideration are the three entries for which timely certificates of actual use have been filed. These entries which are in the category marked "C" have (as previously noted) accompanying commercial invoices which state that the merchandise is for kidney machines in accordance with the duty-free provisions of item 854.20. As we have already seen in discussing the suspension of liquidation

question, this statement on the commercial invoices by the exporter did not comply with the declaration of intent requirements of regulation 10.134 and for that reason alone plaintiff may not prevail as to these three entries.

Aside from this, there is nothing in the stipulation submitted by the parties which shows that the plaintiff at the time of importation intended the imported tubing to be used in the manner prescribed by item 854.20. In lieu of factual evidence, plaintiff contends that the merchandise in question was classified by import specialists who are "usually well informed as to the nature of the goods they are inspecting" and to whom some knowledge of commerce is attributed. Based on this imputed knowledge and the continued averments of plaintiff (by protest, for example) that the merchandise was to be used in the manufacture of artificial kidney coils, plaintiff *assumes* that its intent was made clear to the customs officials in Chicago. Plaintiff also points out that under the stipulation the only possible legal market for kidney coils within the Federal Food, Drug and Cosmetic Act was to hospitals and patients with a prescription.

With regard to these arguments, the court cannot decide this case upon the assumption that the import specialists were imputed with the knowledge of the importer's intent as to the use of the imported cellulosic plastic cuprophan tubing. For one thing, the fact that Customs consistently classified the merchandise as entered under items 772.65 or 771.35 and consistently denied the protests claiming duty-free entry under item 854.20 leads to the opposite conclusion. At the very least, such action would refute the imputed knowledge plaintiff ascribes to Customs as to the intended use of the importations.

Furthermore, the remarks of Congressman Mills, Chairman of the Committee on Ways and Means, before the U.S. House of Representatives on September 30, 1968, 114 Cong. Rec. 28694–5 (1968), make it clear that cellulosic plastics materials (such as imported here) have *various* uses and that only importations for use in kidney machines by hospitals or patients would be duty free. Thus Congressman Mills stated (*id.* at 28695):

> The committee noted, however, that cellulosic plastics materials have many uses and, therefore, has amended the bill, as introduced, to provide duty-free entry only when such materials are imported for use in artificial kidney machines or apparatus by a hospital or by a patient pursuant to prescription of a physician.

Under such circumstances, it would hardly be evident to Customs—absent a declaration of intent by the importer—that the imported cellulosic plastics tubing was intended for use solely in kidney machines.

For all the foregoing reasons, the 24 consolidated cases are dismissed and judgment will be entered accordingly.

(C.D. 4744)

E. M. LABORATORIES, INC. *v.* UNITED STATES

Thin layer chromatography plates

Court No. 76-7-01689

Port of New York

[Judgment for plaintiff.]

(Decided May 26, 1978)

Donohue and Donohue (*James A. Geraghty* and *Joseph F. Donohue* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

BOE, Judge: The merchandise in question in the above-entitled action, more particularly described as thin layer chromatography plates, was imported by the plaintiff from West Germany and entered at the port of New York between December 1973 and October 1974.

Upon liquidation, the merchandise was classified under item 547.55, TSUS, as modified by Presidential Proclamation 3822, providing:

Schedule 5, Part 3
Subpart C headnotes:

* * * * * * *

2. The provisions in this subpart for laboratory glassware (items 547.53 and 547.55) include laboratory apparatus or instruments which are essentially glassware whether or not furnished with supports, frames, or mounts of other materials.

* * * * * * * *

Pharmaceutical, hygienic, and laboratory glassware, whether or not graduated or calibrated:

* * * * * * *

547.55	Other	21% ad val.

The plaintiff, however, contends that said merchandise is properly classified under item 711.88, TSUS, as modified by Presidential Proclamation 3822, providing:

Schedule 7, Part 2
Part 2 headnotes:

1. This part does not cover—

* * * * * * *

(iii) pharmaceutical, hygienic, and laboratory glassware (see part 3C of schedule 5);

* * * * * * *

Subpart D. – Measuring, Testing, and Controlling Instruments

* * * * * * *

Polarimeters, refractometers, spectrometers, gas analysis apparatus and other instruments or apparatus for physical or chemical analysis; * * *:

* * * * * * *

711.88	Other	11% ad val.

The imported articles of merchandise in question are commonly referred to as TLC plates. Each plate consisted of a sheet of plain, ordinary glass to which a silica gel adsorbent layer was affixed and bound by means of a special patented binder process.

Chromatography is defined as a technical procedure of analysis causing a separation and fractionation of materials or substances, whether gas, liquid or solid. This analytical process consists of two principal methods generally referred to as liquid chromatography and gas chromatography. In the former method the analysis is made by the dissolution of the unknown substance; in the latter method the analysis is made by evaporation and distillation. Under the general classification of liquid chromatography, thin layer chromatography is one of several methods of analysis. The thin layer chromatography process should be briefly described for the purpose of relating the function of the TLC plate therewith.

The proper adsorbent medium is affixed and bound to a plate or mount which may consist of glass, plastic, aluminum or steel.[1] A substance sought to be chemically analyzed and determined is applied in a series of spots on the adsorbent layer of the TLC plate. The TLC plate thereupon is placed in a jar or vessel containing a developing solvent. As the solvent rises through the adsorbent layer

[1] Silica gel and alumina are examples of commonly used adsorbents. These adsorbents may be impregnated with additional substances such as silver nitrate when required for a specific analysis.

bound to the plate, the substance sought to be chemically analyzed is broken down into its components elements. Upon drying, the plate and the substances originally placed thereon for analytical purposes may be treated by the use of dyes and other solutions, as well as by light rays, thereby permitting an identification of the separated substances and their component elements.[2]

It is undisputed and acknowledged that a TLC plate is an instrument used exclusively for laboratory purposes. It must likewise be acknowledged that quantitatively a TLC plate, as an instrument, contains a greater percentage of glass in comparison to the adsorbent layer of the substance and/or materials with which it is combined.

Headnote 2, subpart C, part 3, schedule 5 of the Tariff Schedules of the United States in specifying certain articles within the definition of "laboratory glassware" includes "laboratory apparatus or instruments which are essentially glassware whether or not furnished with supports, frames, or mounts of other materials." Relying, however, upon the foregoing headnote, the defendant contends that because a TLC plate is used in the laboratory and is "essentially" glass, the article accordingly is "laboratory glassware" within the purview of item 547.55, TSUS. It is the opinion of the court, however, that to accept this questionable sophistic reasoning of the defendant is to ignore the intent of the Congress in the general classification of Glass and Glass Products under part 3, schedule 5, TSUS, and the more specific subordinate classification, subpart C, thereunder.

Headnote 2 under subpart C, by way of explanation, advises that the generic classification, "laboratory glassware," includes "laboratory apparatus or instruments which are essentially glassware." The intent of Congress expressed therein is to assure that not only "laboratory apparatus and instruments" wholly made of glass are to be classified under subpart C and more specifically items 547.53 and 547.55, but that "laboratory apparatus and instruments essentially made of glass" likewise are to be classified thereunder. The headnote does not define "laboratory glassware" nor indicate its nature or type of use in the laboratory. Inasmuch as the tariff schedules include glass instruments and apparatus also used in the laboratory under differing classifications, it falls upon the court to determine the character of the glassware instruments and their use in the laboratory as contemplated by the statutory term "laboratory glassware."

Absent a more precise definition of the common meaning of "laboratory glassware," other than the broad inclusionary reference made in headnote 2, subpart C, and in view of the uncertain and ambiguous meaning of the term, it is proper that reference be made to historical

[2] *See also Van Nostrand's Scientific Encyclopedia*, 4th ed., on the subject of chromatography, pp. 342-346 (1968).

and explanatory sources in order to ascertain the congressional intent in the use of the term. *Rifkin Textiles Corp.* v. *United States*, 54 CCPA 138, C.A.D. 925, *cert. denied*, 389 U.S. 931 (1967). In the *Summaries of Tariff Information*, United States Tariff Commission, Vol. 2 (1948), a description and use of "laboratory glassware," as provided for in paragraph 218(a) of the Tariff Act of 1930, the predecessor of item 547.55 TSUS, is more definitively provided:

> *Description and uses.*—This summary covers glassware used chiefly for laboratory and scientific purposes. The number and variety of such glassware articles is large; typical items are beakers, flasks, graduates, thermometers, condensers, and syringes. The ware is made largely of borosilicate glass, which is highly resistant to temperature changes and the dissolving action of chemical solutions. Ware that is not exposed to temperature shock or to corrosive chemicals is made of hard soda-lime glass or, in some instances, of soft lead glass.
>
> * * * * * * *
>
> [S]ome of the items imported supplemented domestic production, such as thermometers, culture dishes, and microscope slides and covers—items which are comparatively inexpensive *but which have to be made under rather close tolerances.** * * *Id.* part 2, at 19. [Emphasis added.]

Summaries of Trade and Tariff Information, United States Tariff Commission (1968), relating to laboratory glassware as classified under item 547.55, TSUS, provides the following descriptive comments:

> Laboratory glassware includes a wide variety of glass articles designed for laboratory, industrial, pharmaceutical, or hygienic applications. Most of these articles are made from borosilicate glass which is more resistant to shock than is soda-lime glass. Soda-lime glass is used only where shock resistance is not an important factor.
>
> Laboratory glassware has several different types of users including schools, hospitals, industrial laboratories, and medical and scientific research institutions. Nearly all of these institutions and firms demand high quality precision ware, often on short notice and, with few exceptions, only the domestic glassware industry is in a position to supply them. [Schedule 5, Volume 4, pp. 29–30.]

The educational background of Dr. Martin Gurkin, witness for the plaintiff, as well as his professional experience as a chemist, clinical scientist and director of laboratory technical services, qualifies the admission of his opinion in evidence with respect to the common meaning of "laboratory glassware" in the scientific community. As illustrative of articles in this classification, he specifically referred to glassware such as graduated cylinders, beakers, microscopic slides. In referring to a common characteristic of "laboratory glassware," namely its resistance to heat and to chemical and caustic substances, he testified that the glass mounting of the TLC plate to which the

adsorbent layer of silica gel had been bound possessed no such characteristics.

"It is a well-established principle that classification of an imported article must rest upon its condition as imported." *The Carrington Co. et al.* v. *United States*, 61 CCPA 77, 81, C.A.D. 1126, 497 F. 2d 902 (1974); *United States* v. *Citroen*, 223 U.S. 407 (1912). An examination of Exhibit 1, a representative sample of a TLC plate imported by the plaintiff, as well as the testimony introduced by the plaintiff relating to its composition and condition at the time of importation, is supportive of the contention of the plaintiff that the merchandise in issue (TLC plate) is not "laboratory glassware" within the intent and purview of item 547.55, TSUS. The evidence indicates without contradiction that the glass mounting of the TLC plate in issue consists of plain glass which has undergone no special processing. The glass serves no other purpose than as a mount to which the silica gel adsorbent layer is affixed and bound. It is fragile and easily breakable. Its lack of resistance to heat can cause it to crack readily in the same manner as ordinary window glass. Although plaintiff's witness testified that in the production of a TLC plate, glass in many instances is preferred as a mounting or plate to which an adsorbent layer is bound, such a choice or preference is directly related to the circumstances surrounding the desired or required use of the particular TLC plate. Thus, if fragility of the plate is a characteristic which is sought to be obviated, a steel, an aluminum or a plastic mount might be preferred.

The defendant in support of the classification determined by the Regional Commissioner of Customs urges that the phrase "essentially glassware" contained in headnote 2, subpart C requires that the TLC plate be characterized as "laboratory glassware" within the purview of item 547.55, TSUS. The fallacy in the defendant's contention, however, lies in the fact that in the instant proceeding, we are considering the classification of an instrument as imported, the use of which is for a specific purpose other than and far different from the purpose and use of the "laboratory glassware" referred to in headnote 2, subpart C and the appropriate tariff items named therein. In the classification of the subject merchandise, to adopt a test or standard predicated upon the fact as to whether a TLC plate is *principally* comprised of glass or whether glass is *essential* to the manufacture and production of the plate is inappropriate.

It appears to the court that whether the glass mounting is "laboratory glassware," whether the mounting consists of ordinary, plain glass, whether a TLC plate quantitatively consists of a greater proportion of glass as compared to other substances and materials combined therewith, or whether glass of any character or description may

be "essential" and/or required for the mounting are questions which are not determinative in the classification of the merchandise in issue.

In this connection the legislative history relating to the Tariff Schedules of the United States and, in particular, items 547.53 and 547.55, again is of interest. Referring to the aforementioned items, the following explanatory notes are contained in the *Tariff Classification Study*, schedule 5, part 3 (1960), at 145:

> Items 547.53 and 547.55—These articles are currently provided for in paragraph 218(a). The proposed provisions reflect the existing rates of duty for the two types of glasses. The current provisions of paragraph 218(a), however, cover a number of glass instruments that in the proposed schedules are provided for in part 2 of schedule 7. These instruments include thermometers, hydrometers, syringes, and similar articles. *Also, part 2 of schedule 7 covers articles of laboratory glassware that have been permanently combined with other materials to form an instruments* [*sic*] *for specific purposes.* [Emphasis added.]

From the foregoing, it is evident that it was the intent of Congress to exclude certain "laboratory glassware" from the general tariff schedules relating thereto and to place them under a classification pertaining to specific and definitive purposes (part 2, schedule 7, TSUS). As will be noted from the above-quoted comment, before "laboratory glassware" is deemed to be excluded from schedule 5, part 3, items 547.53 and 547.55 thereunder, the glassware must have been "permanently combined with other materials *to form an instrument for specific purposes.*" (Emphasis supplied.)

An examination of Exhibit 1 reveals that the silica gel adsorbent layer has been firmly affixed and bonded to the glass plate mounting. This "binding process" to the plate or mounting is patented and is a trade secret. Eighty percent (80%) of the cost of the TLC plates as imported is due to the manufacture, processing, packing and quality control of the merchandise in issue. Precision is of prime importance in the production of the TLC plates so as to properly control the particle size, particle distribution, and pore size of the silica gel, which, in turn, gives to the substance and material its "surface activity." As the witness for the plaintiff, Dr. Martin Gurkin, testified, it is the silica gel adsorbent layer on the glass mounting which causes it to be an article of commerce.

The defendant, however, contends that the classification of the TLC plates under item 711.88, TSUS, is precluded because headnote 1(iii) under part 2, schedule 7 provides that part 2 does not cover "pharmaceutical, hygienic, and laboratory glassware." This contention is without merit. It is clear from the *Tariff Classification Study* that part 2 of schedule 7 does include articles, glassware or otherwise, which have been permanently combined with other materials to form instruments for specific scientific and analytical purposes.

In this regard, the defendant urges that the combination or binding of the silica gel adsorbent layer to the glass mounting of a TLC plate is not permanent. In support of its contention, defendant points to the testimony of Dr. Gurkin, who on cross-examination, testified that it was "conceivable" that the merchandise in issue after usage could be "scraped" and resurfaced with a silica gel adsorbent layer.[3]

The interpretation of a given word must be made in the proper context in which it is used. Indeed, the term "permanently" under certain circumstances may bear the synonymous meaning of "perpetual" or "everlasting." However, to here invoke such a synonymous definition, as suggested by the defendant, does not properly construe the intent of the explanatory comment in the *Tariff Classification Study* aforereferred to. The phrase "permanently combined" is more properly used in the sense of describing the "steadfast," "long-lasting" and "continuing" characteristics of the adsorbent materials and the article of glassware which have been combined.[4] From all of the evidence adduced, as well as from an examination of Exhibit 1, it appears that the silica gel adsorbent layer remained firmly "bound" and/or "combined" to the glass mounting from the time of its manufacture, throughout the period of its importation into the United States, throughout the period of its transportation within the arteries of domestic commerce, and throughout the period of its ultimate use in a laboratory for chemical analysis purposes. No evidence has been adduced that the adsorbent layer is removed from the plate as a result of the chromatography testing process. On the contrary, defendant's cross-examination of plaintiff's witness, as aforereferred to, dwelled upon the possibility of "scraping" the adsorbent layer from the plate *after* its use as an analytical instrument. It is difficult for the court to visualize to what extent a more "permanent combination" might be contemplated than for the intended life of the testing instrument itself.

At the time of importation, the merchandise in issue consisted of a plate of glass, which, irrespective of its original individual classification, had been permanently combined with other materials to form a new and distinctive instrument, undisputedly designed for chemical analysis purposes. This article, whether the mounting consisted of glass, aluminum, plastic or steel, when combined with an appropriate adsorbent layer assumed a specific identity designed only for a single purpose—an instrument for chemical analysis in the thin layer chromatography process. As our appellate court has stated in the case of

[3] Dr. Gurkin testified: "It's conceivable but I never heard anyone doing it." (R. 72.)
[4] *Roget's International Thesaurus*, 3d ed., p. 50, 110.10 (1962).

United States v. *F. B. Vandergrift & Co., Inc.*, 44 CCPA 15, 17, C.A.D. 628 (1956):

> * * * where, as here, an article is designed and manufactured with a single purpose in mind and is made to specifications which peculiarly adapt it to that purpose, it is properly considered to be dedicated to that purpose * * *.

The court, accordingly, finds that the plaintiff has sustained its dual burden of proof in establishing that the liquidated classification of the merchandise in issue by the Regional Commissioner of Customs under item 547.55, TSUS, was in error and incorrect and that the claimed classification with respect to such merchandise under item 711.88, TSUS, is correct and proper.

Let judgment be entered accordingly.

(C.D. 4745)

ATAKA AMERICA, INC. *v.* UNITED STATES

Memorandum Opinion Accompanying Order

Court Nos. 73-9-02625-S, etc.

Port of New York

[Judgment for defendant.]

(Dated June 5, 1978)

Rode & Qualey (*Ellsworth F. Qualey* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

BOE, Judge: The defendant has filed a motion for summary judgment in the above-entitled action requesting that the classification of the imported merchandise under item 709.05, TSUS, by the Regional Commissioner of Customs at the port of New York, New York be sustained. In so doing, the defendant urges that the within proceedings are controlled by the decision of the United States Court of Customs and Patent Appeals in the case of *United States* v. *Ataka America, Inc.*, 64 CCPA 60, C.A.D. 1184, 550 F. 2d 33 (1977). By prior order of this court, the record in the prior *Ataka* case has been incorporated and made a part of the record herein.

The plaintiff in objecting to the motion of the defendant contends that there are issues of fact relating to the use of the merchandise in question which have not been resolved by the pleadings and that the entry of summary judgment herein would deny the plaintiff a right to

a trial before this court of such material facts that are in issue. After a consideration of the briefs submitted by counsel and after an oral argument, the court is of the opinion that the doctrine of stare decisis is applicable in the above-entitled action and that, accordingly, the defendant's motion for summary judgment must be granted.

It is acknowledged that the parties involved in the instant action as well as in the prior case of *United States* v. *Ataka America, Inc., supra*, are identical. It is further admitted that the instrument (fiberscope) in question in the instant action is substantially the same type of merchandise in issue in the former decision of our appellate court. In like manner, the factual circumstances and the legal issues of the prior *Ataka* case are for all intents and purposes identical with those presented herein. The response of the plaintiff to defendant's motion does not indicate to the satisfaction of the court that any new evidence can or will be submitted in the event of a trial herein, which would present the consideration of facts different from those considered in the prior *Ataka* case. The affidavits of two of the witnesses submitted as a part of plaintiff's response to the motion for summary judgment by the defendant, although rephrased, are in all material respects the same as the testimony offered by such witnesses at the trial of the prior *Ataka* case. The testimony of the third witness offered by way of affidavit by the plaintiff is purely corroborative in character. *See Herman D. Steel Co.* v. *United States*, 49 CCPA 30, C.A.D. 790 (1962).

The basis of the plaintiff's contention that a trial before the court of all factual issues in this case should be permitted is predicated on the testimony that the optical features of the instrument in question (fiberscope) are subsidiary to the diagnostic and therapeutic elements of the instrument (use in connection with biopsies and cytologies). The mere declaration of such an opinion contained in the affidavits submitted by plaintiff does not constitute such new evidence as would remove the instant action from the purview of the decision of the United States Court of Customs and Patent Appeals in the prior case of *United States* v. *Ataka America, Inc., supra.* In discussing the alleged subsidiary character of the visual elements of the fiberscope, our appellate court therein stated:

> * * * Depending upon the situation, that visual operation may be all that is performed. It is only after visual examination that a decision to take a biopsy or cytology specimen can be made.
>
> To term optical features merely subsidiary to biopsy-cytology features, when the latter *require* the former, and when the latter are not always used and the former are always used, would be contrary to reason. Accordingly, we hold that the imported

fiberscopes meet the definition of "optical instruments" in headnote 3. * * * Id. 67, 550 F. 2d 37–38.

It is noted that in the petition for rehearing to the United States Court of Customs and Patent Appeals in the prior *Ataka* case, many arguments were raised, which are similarly urged herein, relating to the misapprehension and misinterpretation of our appellate court with respect to the term "optical instrument" as contained in the Tariff Schedules of the United States. Whether such a misapprehension existed must necessarily be determined by our appellate court. Under the record submitted in connection with the instant action, it is obligatory upon this court to find that no further evidence has been presented sufficient to exclude the same from the decision of our appellate court in the prior case of *Ataka America, Inc., supra. See United States* v. *Eurasia Import Co., Inc.*, 34 CCPA 121, C.A.D. 353 (1946).

After the submission of the above-entitled action for determination, but at the time of the oral argument requested by the court, the plaintiff moved the court for leave to amend its claim as presented in its pleadings by asserting an alternative claim classifying the merchandise in question under item 708.76, TSUS, as a microscope. To this motion the defendant strenuously objected. It is the opinion of the court that such motion to amend at this late stage of the within proceedings is, indeed, untimely and, accordingly, is denied.

Let an order be entered accordingly.

(C.D. 4746)

SORTEX COMPANY OF NORTH AMERICA, INC. *v.* UNITED STATES

Sortex machines

INDUSTRIAL MACHINERY—FOOD PREPARATION AND MANUFACTURE

Electronic optical sorting, grading and screening machines exported from England and classified in liquidation upon entry at Detroit, Michigan, under TSUS item 712.49 as other electrical measuring, checking, analyzing, or automatically-controlling instruments and apparatus, which are chiefly used as industrial processing machines in the preparation and manufacture of food for human consumption, *held*, to be more specifically provided for under TSUS item 666.25 as other industrial machinery for the preparation and manufacture of food, even though the machinery has as an essential feature an electrical device.

Court No. 74-11-03110

Port of Detroit

[Judgment for plaintiff.]

(Decided June 6, 1978)

Schwartz & Lidstrom (*Steven P. Sonnenberg* and *Donald J. Unger* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sheila N. Ziff*, trial attorney), for the defendant.

RICHARDSON, Judge: Electronic optical color sorting machines exported from England in December, 1973, were classified in liquidation upon entry at Detroit, Michigan, under TSUS item 712.49 as modified by T.D. 68-9 as other electrical measuring, checking, analyzing or automatically-controlling instruments and apparatus at the duty rate of 10 *per centum ad valorem*. And the plaintiff-importer claims that the machines should be classified under TSUS item 666.25 as modified by T.D. 68-9 as other industrial machinery for preparing and manufacturing food at the rate of 5.5 *per centum ad valorem*. Two models are involved in the importations before the court, namely, models 964 and 964C.[1]

At the trial Daniel Garnett, principal engineer of A.M.F. Incorporated, electrical products development group, testified that, among other things, he was employed as an engineer by plaintiff for approximately 10 years between 1966 and October, 1976, and that his duties included machinery development, application and installation engineering, and, to some extent, involved the marketing of machines of the type in issue. Mr. Garnett was with Sortex when these machines were first introduced to the United States market, was involved in the initial introduction of the machines in that market, and worked as an engineer on many of the design problems which arose when the basic machines were adapted to different products. According to the witness the machine, as originally introduced, was designed for the sorting of rice, but was later adapted to sort beans, peanuts and corn, and to a small extent minerals and plastics.

Mr. Garnett testified that the machine operates by feeding the product to be sorted so that it is metered and singulated in the feed-in system. The product passes single file through optical chambers where electronic photosensors compare the product to a pre-set background. If a particle combined with the desirable product causes variations of reflectivity, because it is of a different color, an air blast is triggered electronically and that particle is removed from the stream

[1] Additionally it was stipulated at the trial that the model 962 machine concerning which testimony would be offered is the same as the model 964 machine which superseded it in production.

of acceptable product. Individual particles are sorted, graded and screened in the sorting machines.

Based upon his experience and expertise as an installation engineer Mr. Garnett described essential considerations in determining where the machines can be used efficiently. The machine must be placed in a suitable environmental area, away from temperature extremes, in a dry atmosphere, with access to main power and compressed air, out of direct sunlight and with suitable facilities for transport of the product to be sorted to and from the machine. Rain or snow could cause severe problems with the electronics and the electrical functions of the machine. Direct sunlight would upset the balance of light in the machine and adversely affect the performance of the machine. The witness said his role in marketing the sorters consisted of assisting Sortex salesmen in defining the best place in the various process lines to fit the machine, defining installation costs and ancillary equipment requirements.

Other evidence in the record discloses usage of the imported machines in the sorting of specific food products, namely, white beans, peanuts, almonds, pecan pieces, sesame seed, dehydrated potato pieces, split soybeans, peppers, cereal components, etc., in 23 states. Two of these sorting operations involving the machines were viewed by the court and counsel at the conclusion of the trial at plant sites in Michigan, namely, a peanut sorting operation at Livonia, Michigan, and a navy bean sorting operation at Charlotte, Michigan. In both instances the court observed, among other things, that the food products were fed from the blancher into the Sortex machines and emerged therefrom after the removal of undesirable peanut and bean particles which were rejected and collected separately. Following the sorting of the peanuts the splits were further processed into peanut butter and placed in glass containers in the same plant.

Plaintiff contends primarily that the imported machines are described in item 666.25, and argues "[t]he Sortex machines of the same class or kind as those at issue herein, are chiefly used midway in the processes which take place in preparing and manufacturing food." Defendant counters, "it is patent that the Sortex 962 and 964 sorting machines were not, as of January 1974, chiefly used for preparing and manufacturing food, but, rather, to prepare various foodstuffs for market."

In the court's opinion the imported machines do come within the ambit of item 666.25.

The word "prepared," in the tariff sense as related to food has been judicially construed to mean that the food has been so processed as to be changed in character or advanced in condition and made more valuable for its intended use. *Stone & Downer Co.* v. *United States*, 17 CCPA 34, at p. 36, T.D. 43323 (1929).

In some of the cases before the court food, such as beans, is put in packages for sales to the wholesale-retail trade immediately after sorting, and in some others the food is subjected to additional processes in the same or another building before being packaged or sold as food, such as corn, candy, salted nuts, peanut butter, etc. Plaintiff contends that these processes either change the character of the mentioned food items or advance them toward the condition in which they are used. Plaintiff cites as supporting authority for its position that the sorting and grading function of the Sortex machines is a part of the process of preparing and manufacturing food the case of *Antonio Roig Sucrs. S. En C.* v. *United States*, 56 CCPA 72, C.A.D. 957 (1969), where the function of a 10-ton electric tower crane was to pick up sugarcane from a stockpile and load it on a conveyor, and thus start the sugarcane on its way into a sugar mill factory was held to be the first step in the process of manufacturing sugar from cane. Preparing beans or peanuts for human consumption requires a number of operations and many pieces of equipment of various kinds and the Sortex machine is one of them.

Plaintiff also relies on the 1969 *Summaries of Trade and Tariff Information* which include on its list of "other" industrial machines for preparing and manufacturing food, machines "to . . . sort, grade, . . . [and] screen," which is precisely what the Sortex machine before the court does. Since the 1969 *Summaries of Trade and Tariff Information* were prepared *after* the Tariff Schedules of 1963 were enacted they are "not necessarily controlling in determining the intent of the enactors of the statute." *Dodge & Olcott, Inc.* v. *United States*, 45 CCPA 113, at p. 116, C.A.D. 683 (1958). Though the 1969 *Summaries* are "not necessarily controlling," their broadening of the 1948 list of the more important "other" kinds of machines under item 666.25 that perform functions in the preparation and manufacture of food that are similar to those listed in the *Summaries of Tariff Information* in 1948, is in keeping with the responsibility of the United States Tariff Commission to update the commodity *Summaries of Tariff Information*, and shows a recognition of "other" industrial machines that are just as essential to the preparation and manufacture of food as the machines previously listed. While machines that *sort*, *grade* and *screen* may have been considered embraced in "other" food preparing machines in the *Summaries of Tariff Information* of 1948, expressly listing such machines in the *Summaries of Trade and Tariff Information* of 1969 leaves no doubt that the Tariff Commission classifies a machine that performs the functions of *sorting*, *grading* and *screening*, as does the Sortex machine, as an industrial machine for preparing and manufacturing food. The

Summaries of Trade and Tariff Information do serve as a helpful guide to the courts as well as the legislature in reaching decisions.

Where there is a substantial similarity between the function of two items of merchandise—one recognized and listed in a category in the *Summaries of Tariff Information* (1948), before the enactment of a statute (1963), and one listed under the same category in subsequent *Summaries of Trade and Tariff Information* (1969), after the enactment of said statute, the court may appropriately consider the two items of merchandise as being classified under the same item in the tariff schedules. See: *Christensen Diamond Products Co.* v. *United States*, 54 Cust. Ct. 221, C.D. 2537 (1965), where natural diamond dust was known before 1930 and was provided for in the Tariff Act of 1930, and synthetic diamond dust was developed after 1930, but both items of merchandise were substantially similar and performed substantially similar functions, and the court held that synthetic diamond dust should be classified the same as natural diamond dust.[2] See also *F. W. Myers & Co., Inc.* v. *United States*, 76 Cust. Ct. 51, C.D. 4635 (1976).

The defendant contends that the decision in *Sortex Co. of North America* v. *United States*, 56 CCPA 41, C.A.D. 951, 410 F. 2d 443 (1969) is controlling in this case. The issue in the previous *Sortex* case was whether the machine was an agricultural instrument used in connection with farming operations or was a machine having as an essential feature an electrical device. The evidence clearly established that the machine was not employed by farmers on the farms but by business enterprises away from the farms which process crops produced by the farmers, and that the machine had as an essential feature an electrical element or device. The decision did not go so far as to say that when the Sortex machine is used as the end part of a preparation and manufacturing process (as in the case of beans) or as the middle part of such a process (as in the case of peanuts—some cleaned, shelled, separated and salted before sorting; some roasted, blanched and salted before sorting; and some sorted with the splits being made into peanut butter), the machine should not be classified under a

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[2] Congress amended the Tariff Act to conform the statute with the *Myers* decision. See: Senate Finance Committee Report, No. 530, on H.R. 7969, 89th Congress, 1st Session, at p. 13, on the Tariff Schedules Technical Amendments Act of 1965. The Report states:

". . . the Customs Court ruled in two separate cases that synthetic diamond dust was included within the duty-free designation under the old tariff law. (*Christiansen* [*sic*] *Diamond Products Co.* v. *U.S.* C.D. 2537; *Englehard Hanovia, Inc.* v. *U.S.* C.D. 2538.) In each instance, the Court found that the term "diamond dust" was not qualified by anything which preceded it in the statutory language; that the statute involved was an unqualified *eo nomine* provision; and that synthetic diamond dust, like its natural counterpart, was duty-free for tariff purposes.

"Notwithstanding the fact that these Customs Court decisions are not yet final, your committee desires to make it clear that in the future synthetic miners' diamonds and synthetic diamond dust and powder are to be free of duty in the same manner as their natural counterparts.

"Accordingly, a new section is added to the bill to provide duty-free treatment for synthetic diamond dust and miners' diamonds. . . ."

more appropriate item in the Tariff Schedules. The issue in this case was not before the court in the earlier *Sortex* case.

After touring a Velvet Food Products, Inc. peanut butter plant in Livonia, Michigan, and a white bean processing plant in Charlotte, Michigan, with counsel for the parties in this case; seeing how the Sortex machine functions as a machine in the processing of said food items, and reviewing the record, especially pages 84 through 134 covering the use of Sortex machines in processing sesame seed, almonds, pecans, peanuts, white beans, soybeans, dehydrated potato pieces, peppers, cereal components, etc. in thirty one locations in the United States, the court is of the opinion that the chief use of the Sortex machine is as an industrial machine for preparing and manufacturing food by sorting, grading and screening food items for human consumption, and the court so holds.

The Sortex machine like so much other food processing machinery has as an essential element an electrical device, but it is more specifically provided for under TSUS item 666.25 as other industrial machinery for the preparation, processing and manufacture of food than under item 712.49 as other electrical measuring, checking, analyzing or automatically-controlling instruments and apparatus for ships' logs, and for measuring and detecting alpha, beta, gamma, X-ray, cosmic or similar radiations, seismographs, etc., and the court so holds. See: Interpretative Rule: "10(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it . . . ." Judgment will be entered for the plaintiff.

(C.D. 4747)

JOHN H. FAUNCE, INC.
MASONITE CORPORATION } *v.* UNITED STATES

Speed-up system for hardboard press

PART OF HARDBOARD PRESS—CLASSIFICATION

In the Tariff Schedules of the United States, hardboard is provided for *eo nomine*, and is included with certain wood products in part 3, schedule 2, rather than with paper and paperboard in part 4, schedule 2. Additionally, pursuant to headnote 1, part 1, schedule 2, hardboard is deemed to be wood for purposes of subparts D, E and F of part 1. Since in the TSUS, Congress recognized hardboard to be wood rather than paper or paperboard, the imported speed-up system for a hardboard press is not classifiable under the provision in item 668.06, TSUS, covering parts of machines for making cellulosic pulp, paper or paperboard, as claimed by plaintiffs, or under the provision in item 668.00, TSUS, covering machines for

making cellulosic pulp, paper or paperboard, as alternatively claimed.

STATUTORY CONSTRUCTION—UNDER PRIOR TARIFF ACT

Judicial construction under a prior tariff act is not dispositive in a case arising under the TSUS, where as here, there has been a substantial change in the statutory provisions affecting the product. *Cf. Inter-Maritime Forwarding Co., Inc.* v. *United States*, 70 Cust. Ct. 133, C.D. 4419 (1973). Accordingly, *United States* v. *Superwood Corporation*, 52 CCPA 57, C.A.D. 858 (1965), and *F. S. Whelan & Sons* v. *United States*, 40 Cust. Ct. 192, C.D. 1982 (1958), decided under the Tariff Act of 1930, which contained no specific provision for hardboard, held not controlling under the TSUS.

MACHINES FOR MAKING PAPER AND PAPERBOARD AND PARTS THEREOF

Items 668.00 and 668.06, TSUS, cover machines and parts thereof that make "paper or paperboard" within the ambit of schedule 2, part 4, TSUS. Consequently, as hardboard is not paper or paperboard within the ambit of part 4, neither item 668.00 nor item 668.06 embraces machines or parts thereof for making hardboard.

MOTION TO CONFORM PLEADINGS TO EVIDENCE (RULE 4.8(b))

Since there is no evidence in the record specifically addressed to the factual issue of whether the transformation of materials in a Motala hardboard press results principally from temperature change, defendant's motion pursuant to rule 4.8(b) to conform the pleadings to the evidence, in order to assert a classification under item 661.70, TSUS, is denied.

Court No. 69/35104

Port of Philadelphia

[Judgment for defendant.]

(Decided June 7, 1978)

Sharretts, Paley, Carter & Blauvelt (*Patrick D. Gill* and *Donald W. Paley* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

NEWMAN, Judge: This action concerns the proper tariff classification for a "Motala" hardboard press speed-up hydraulic system exported from Sweden and entered at the port of Philadelphia in December 1968.

The speed-up system was assessed with duty by the district director at the rate of 9 per centum ad valorem pursuant to item 678.50, TSUS, as modified by T.D. 68–9, which provides for "Machines not specially provided for, and parts thereof". Defendant now claims, for the first time in its post-trial brief, that the merchandise is classifiable under item 661.70, TSUS, as modified, as part of an industrial machine for

the treatment of materials by a process involving a change of temperature, which is dutiable at the rate of 11 per centum ad valorem. To assert this newly proposed classification, defendant moves to amend the pleadings to conform to the evidence under rule 4.8(b).

Plaintiffs claim that the merchandise is properly dutiable at the rate of 6 per centum ad valorem, either under the provision in item 668.06, TSUS, as modified, covering "Parts of machines for making cellulosic pulp, paper or paperboard", or alternatively under the provision in item 668.00, TSUS, as modified, covering "Machines for making cellulosic pulp, paper, or paperboard". In their reply brief, plaintiffs strenuously object to defendant's motion under rule 4.8(b).

I.

At the trial, each party presented the testimony of two witnesses and various exhibits. The official papers were received in evidence, without marking. Plaintiffs' witnesses were: George Uding, vice president of manufacturing for the Hardboard Division of Masonite Corporation; and Jack Mulholland, vice president of manufacturing technology and engineering for Masonite Corporation. Defendant's witnesses were: Harry Radden, president of Miller Hoft, Inc.; and Charles A. Shoudy, vice president of project engineering for Olin Craft.

Portions of the record in *F. S. Whelan & Sons* v. *United States*, 40 Cust. Ct. 192, C.D. 1982 (1958), were incorporated in the record of the present case upon defendant's motion before trial, pursuant to an order of the court dated November 25, 1975.

In the circumstances of the present case, it is unnecessary to dwell at length on the testimony of record. The pertinent facts are not in dispute, and may be briefly summarized.

It has been clearly established that the imported speed-up hydraulic system was installed as an integral part of Masonite's Motala hardboard press located at its plant in Towanda, Pennsylvania. The system is designed to speed up the production cycle of the Motala hardboard press, thus increasing its efficiency in the production of hardboard. Further, it has been shown that the Motala hardboard press, by a combination of heat and pressure, consolidates a loose interfelting of fibers "so that you have a hard dense product which is known as hardboard" (R. 43). Finally, it appears that the Motala press is of the same class or kind as the hardboard press involved in *United States* v. *Superwood Corporation*, 52 CCPA 57, C.A.D. 858 (1965).

II.

In order for plaintiffs to prevail on either of their alternative claims, they were required to establish that the speed-up hydraulic system

was used for making cellulosic pulp, paper or paperboard. There is no dispute that Masonite's Motala press (of which the speed-up system is a part) was used for making hardboard. Consequently, the tariff classification of hardboard itself is pivotal in determining whether the speed-up system is classifiable under either of the claimed provisions.

As dispositive of the issue presented, plaintiffs rely upon the *Whelan* and *Superwood* cases, *supra*, decided under the Tariff Act of 1930. In the 1930 act, there was no specific provision for hardboard. Thus, in *Whelan*, hardboard was held properly dutiable as pulpboard under paragraph 1413 of the Tariff Act of 1930.[1]

Again, in *Superwood*, hardboard was held to be a form of paper, and certain hardboard making equipment (including a hydraulic press) was determined to be properly dutiable under paragraph 372 of the Tariff Act of 1930 as machines for making paper. Accordingly, if this case were governed by the Tariff Act of 1930, *Whelan* and *Superwood* would, plainly, be dispositive.

However, defendant contends that *Whelan* and *Superwood* are not viable under the TSUS in view of the new *eo nomine* provisions for hardboard, which defendant emphasizes were included in part 3 of schedule 2 of the Tariff Schedules rather than in part 4 of schedule 2. It should be noted that part 3 covers "WOOD VENEERS, PLYWOOD AND OTHER WOOD-VENEER ASSEMBLIES, AND BUILDING BOARDS", whereas part 4 includes "PAPER, PAPERBOARD, AND PRODUCTS THEREOF". Additionally, defendant cites headnote 1, part 1, schedule 2, in support of its contention that in the TSUS Congress recognized hardboard as wood. Headnote 1 reads:

> 1. For the purposes of subparts D, E, and F of this part, hardboard shall be deemed to be wood.

I agree with defendant that *Whelan* and *Superwood* are not controlling under the TSUS. Fundamentally, a judicial construction under a prior tariff act is not dispositive in a case arising under the TSUS, where as here, there has been a substantial change in the statutory provisions affecting the product. *Cf. Inter-Maritime Forwarding Co., Inc.* v. *United States*, 70 Cust. Ct. 133, C.D. 4419 (1973).

As observed, *supra*, there was no specific provision for hardboard in the Tariff Act of 1930, whereas in the TSUS, hardboard is covered *eo nomine* and included in part 3 of schedule 2, rather than in part 4 of schedule 2. The inclusion of hardboard in part 3 rather than in part 4 of schedule 2, as well as the insertion of headnote 1, part 1, schedule 2, clearly evinces a congressional recognition that hardboard is wood, and not paper or paperboard.

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[1] See also *F. S. Whelan & Sons* v. *United States*, 34 Cust. Ct. 208, C.D. 1706, 136 F. Supp. 328 (1955), wherein the same conclusion was reached.

Even prior to the TSUS, Congress recognized hardboard as wood in various bills seeking to reclassify hardboard under the wood schedule of the Tariff Act of 1930. Hence, in *Weyerhaeuser Company* v. *United States* (*Abitibi Corporation, Party-in-Interest*), 71 Cust. Ct. 81, 92, n. 9, C.D. 4479 (1973), Judge Maletz stated:

> Although the House passed an amended version of H.R. 9666 in the second session of the 83d Congress and the Senate in the next session of Congress in 1955 (84th Cong., 1st Sess.) passed a similar provision as an amendment to a tariff bill, the Conference Committee deleted the hardboard reclassification portion of the bill in response to a letter from the President. This letter stated that "[b]y the Customs Simplification Act of 1954, the Congress instructed the U.S. Tariff Commission to review the entire schedule of tariff classifications and to recommend changes needed to remove anomalies and injustices. Action now by the Congress on any specific commodity would directly contravene this process which assures all industries of an orderly method for full consideration of their classification problems." See *Tariff Classification Study, Explanatory and Background Materials*, Schedule 2, at 205, 276 (1960).

In S. Rep. No. 387, 84th Cong., 1st Sess. 2 (1955), the Senate Finance Committee reported:

> * * * When the 1930 act was adopted, hardboard was a relatively unknown product. When first developed, it had some of the qualities of paperboard and was administratively classified as a paper product; however, later developments resulted in the production of hardboard which not only had the principal properties of wood but also a counterpart of wood in general usage.

Moreover in 1954, pursuant to a resolution and directive of the Senate Finance Committee, the Tariff Commission (since renamed International Trade Commission) conducted an investigation with respect to the hardboard industry in the United States and hardboard's tariff classification. See United States Tariff Commission, *Hardboard, Report on Investigation Conducted Pursuant to a Resolution by the Committee on Finance of the United States Senate, dated August 9, 1954* (1955). Based upon its thorough investigation, the majority of the Commission found, *inter alia* (at page 7), "that a specific enumeration of hardboard would be more appropriate *in the tariff schedule covering wood products* than in either the tariff schedule covering paper products or any other tariff schedule" (emphasis added). See also *Tariff Classification Study*, schedule 2 (Nov. 1960), pages 276–79. As noted above, in the TSUS hardboard was specifically enumerated in part 3 rather than in part 4 of schedule 2.

In light of the clear legislative recognition of hardboard as a wood product, I am persuaded that in the TSUS, Congress did not intend that hardboard should be regarded as paper or paperboard for purposes

of classifying machines and parts under items 668.00 and 668.06, TSUS. In my opinion, the machines for making paper and paperboard, and parts thereof, intended to be classified under items 668.00 and 668.06, TSUS, are those machines and parts that make the paper or paperboard products within the ambit of *part 4*, schedule 2. Since hardboard explicitly is not paper or paperboard within the purview of part 4, schedule 2, neither item 668.00 nor 668.06 embraces the importation.

In sum, plaintiffs' contention (brief, p. 29) that the provisions for hardboard in the TSUS "did not represent the conclusion that hardboard is not paper or paperboard" is totally without merit. If Congress considered hardboard as paper or paperboard, as urged by plaintiffs, hardboard most certainly would have been included with the paper and paperboard products in part 4 of schedule 2, rather than with the wood products in part 3 of schedule 2. Plainly, it would be anomalous and completely illogical to have excluded hardboard from part 4 of schedule 2 if Congress intended that hardboard should be considered as "paper or paperboard" for purposes of classifying machines or parts thereof under items 668.00 and 668.06, TSUS. For the foregoing reasons, I conclude that the imported speed-up system is not classifiable under the provisions claimed by plaintiffs.[2]

III.

As stated *supra*, defendant has moved to amend the pleadings to conform to the evidence, pursuant to rule 4.8(b), in order to assert, as it did for the first time in its brief, a proposed classification under item 661.70, TSUS.[3] Rule 4.8(b) reads:

> (b) Amendments To Conform to the Evidence: When issues not raised by the pleadings are tried by express consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. If evidence is objected to at trial on the ground that it is not within the scope of the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to

[2] Although not cited by either party, the *Summaries of Trade and Tariff Information*, schedule 6, volume 3 (1967), page 217, state that item 668.00, TSUS, includes "machines for producing cellulosic building boards, such as insulating board and hardboard". Although considered as authoritative for certain purposes, the *Summaries* issued after the enactment of the TSUS, are not part of its legislative history, and therefore cannot be considered controlling as to legislative intent. *Amico, Inc.* (*Formerly Known As: Exhibit Sales, Inc.*) v. *United States*, 71 Cust. Ct. 182, C.D. 4494 (1973); *Volkswagen of America, Inc.* v. *United States*, 68 Cust. Ct. 122, C.D. 4348 340 F. Supp. 983 (1972), *aff'd per curiam*, 61 CCPA 41, C.A.D. 1115, 494 F. 2d 703 (1974); *W. R. Filbin & Co., Inc.* v. *United States*, 63 Cust. Ct. 200, C.D. 3897, 306 F. Supp. 440 (1969); *Border Brokerage Company, Inc.*, v. *United States*, 64 Cust. Ct. 331, C.D. 3999 (1970).

[3] Defendant requested that the second argument in its brief be considered such a motion.

satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits. The court shall afford the objecting party an opportunity to meet such evidence.

Item 661.70, TSUS, as modified, provides for "Industrial machinery, plant, and similar laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature, such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing, or cooling; * * * all the foregoing * * * and parts thereof: * * * Other", with duty at the modified rate of 11 percent ad valorem. Defendant contends that since the speed-up system is used in a hardboard press which utilizes heat and pressure, the importation is classifiable under item 661.70, TSUS; and that even if the importation is classifiable under both item 661.70 and either item 668.00 or 668.06, item 661.70 must prevail by virtue of headnote 1, subpart A, part 4, schedule 6. That headnote provides:

> 1. A machine or appliance which is described in this subpart and also is described elsewhere in this part is classifiable in this subpart.

Significantly, the *Tariff Classification Study*, schedule 6, discusses item 661.70, TSUS, as follows (at page 263):

> * * * Item 661.70 covers industrial and laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change in temperature. This equipment is designed to submit materials to a heating or cooling process in order to cause the simple change of temperature, *or to cause the transformation of materials resulting principally from the temperature change. The item does not cover equipment in which the heating or cooling, even if essential, is merely a secondary function designed to facilitate the main function.* * * * [Emphasis added].

As indicated in the *Tariff Classification Study*, equipment is not embraced by item 661.70 unless the transformation of materials results *principally* from the temperature change. See *Jagenberg U.S.A., Inc.* v. *United States*, 66 Cust Ct. 247, C.D. 4198 (1971). The record is clear that in the production of hardboard with a Motala press a *combination* of heat and pressure is utilized. (R. 59, 106, 119–20, 133–34). Thus, item 661.70 raises an issue of fact as to whether heat in the Motala press is merely secondary, designed to facilitate the pressure applied by the press; or whether pressure is secondary, designed merely to facilitate the application of heat; or whether heat and pressure are coequal functions of the Motala press.

I do not find, nor does defendant cite, any evidence of record specifically addressed to the factual issue of whether the transformation of materials in the Motala press results *principally* from temperature

change. Nevertheless, defendant baldly argues in its brief that "the application of heat cannot be said to be a secondary function". (Defendant's brief, page 35). Since no evidence was adduced concerning the factual issues raised by item 661.70, in no event could a determination be made that the merchandise is properly classifiable under such provision. Fundamentally, the district director's classification under item 678.50, TSUS, is presumed to be correct, and "the presumption that the goods have been properly classified has evidentiary weight, in and of itself". *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, 58, C.A.D. 1004, 435 F.2d 1315 (1970). Consequently, it is presumed the district director correctly found that the merchandise is not classifiable under item 661.70, TSUS.

In a word, defendant's reliance on rule 4.8(b) is misplaced, and its motion to amend the pleadings to conform to the evidence is denied.

However, inasmuch as plaintiffs failed to establish the propriety of either of the claimed classifications, this action is dismissed. Judgment will be entered accordingly.

(C.D. 4748)

JANEX CORP. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 77-5-00721

Port of New York

[Judgment for plaintiff.]

(Decided June 7, 1978)

Sharretts, Paley, Carter & Blauvelt, P.C. (*Peter Jay Baskin* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Laura D. Millman*, trial attorney), for the defendant.

NEWMAN, Judge: This action presents a classic instance for the appropriate utilization of a summary judgment—the procedural remedy which obviates protracted, expensive and unnecessary litigation where there is no justiciable question of fact.

The within case is before the court on cross-motions for summary judgment pursuant to rule 8.2. Presented for determination is the proper tariff classification for certain articles described on the invoices as "Raggedy Ann Nite Timers" and "Raggedy Andy Nite Timers", imported from Hong Kong through the port of New York in 1976.

The three entries involved herein were liquidated by the regional commissioner of customs as follows: In entry Nos. K520162 and K523068, the merchandise was assessed duty at the rate of 17.5 per centum ad valorem under the provision for "Dolls" in item 737.20, TSUS, as modified by T.D. 68–9; in entry No. K436738, the identical merchandise was assessed at the rate of 8.5 per centum ad valorem under the provision in item 772.15, TSUS, as modified by T.D. 68–9, for "household articles not specially provided for * * * of rubber or plastics: * * * Other".

Plaintiff challenges the Government's classifications, contending that the merchandise is properly dutiable at the rate of 5.5 per centum ad valorem under the provision in item 688.40, TSUS, as modified by T.D. 68–9, for "Electrical articles * * * not specially provided for".

I.

To the extent relevant to these cross-motions, the record comprises the pleadings (including plaintiff's sales brochure depicting the imported articles, which is attached to the complaint and marked exhibit A), and the following:

Plaintiff submitted: an affidavit by its president, A. W. Hughes, Jr., and a sample of the Raggedy Andy Nite-timer containing two "D" size dry cell batteries.[1]

Defendant submitted: a sample of the Raggedy Andy Nite-timer (marked exhibit A), which is identical to plaintiff's sample, except that a plastic ring at the end of a pull-cord at the rear of the figure is missing; two "D" size dry cell batteries in a brown bag (marked exhibit B); and a copy of a letter (marked exhibit C) from plaintiff's counsel, stating that certain samples of the merchandise in issue submitted to defendant are identical to those covered by the entries in this action.

There is no dispute that the Raggedy Andy samples before the court are representative of the Raggedy Ann articles, for which no sample was furnished by either party.

Mr. Hughes' affidavit avers:

As president of Janex Corp., he was personally involved in the design and development of the "Nite-timers". These Nite-timers were designed, developed and sold by plaintiff as night-lights for small children, and "include features, which make them capable of being placed on a night table, dresser, or similar piece of children's furniture so that when lifted they would provide a source of illumination in the dark, or could provide such illumination by pulling the cord on

[1] These batteries were found on examination to be severely corroded, leaking and without power. Therefore, the samples of the merchandise in issue were operated by the court using the batteries submitted by defendant.

the back". Page 6 of plaintiff's 1976 catalog (exhibit A attached to the complaint) accurately depicts the Raggedy Ann and Raggedy Andy Nite-timers. Plaintiff's sample of the Raggedy Andy Nite-timers is identical to the imported Raggedy Andy Nite-timers, and is representative of the imported Raggedy Ann Nite-timers. The Raggedy Andy and Raggedy Ann Nite-timers differ "only to the extent that the doll housing is Raggedy Ann rather than Raggedy Andy". The imported articles were not sold, marketed or advertised as dolls, but as "Nite-timers".

Defendant interposed no supporting or opposing affidavit.

II.

Fundamentally, of course, samples are potent witnesses and have great probative effect respecting the purpose for which an article is designed. *Amico, Inc.* v. *United States*, 79 Cust. Ct. 125, 130, C.D. 4723, 447 F. Supp. 444 (1977), *appeal pending; The Ashflash Corporation* v. *United States*, 76 Cust. Ct. 112, 120, C.D. 4643, 412 F. Supp. 585 (1976); *Amico, Inc.* (*Formerly Known As: Exhibit Sales, Inc.*) v. *United States*, 71 Cust. Ct. 182, 186, C.D. 4494 (1973). And this probative effect is particularly true here.

An examination of the samples submitted by the parties discloses that the imported articles consist of plastic figures, approximately 8-¼ inches in height, representing the form and features of the well-known storybook characters, Raggedy Andy and Raggedy Ann. The figures have a hollow interior which accommodates two "D" size dry cell batteries,[2] electrical switches, wiring, a bulb and other electrical components for illumination through the top of the figures. The articles are designed to light automatically when lifted off a surface (i.e., a dresser top), and switch off when set down again. This operation is accomplished by a pressure switch, which protrudes through the figure's feet when the article is lifted off a surface, and is depressed when the figure is set down again. Additionally, each figure has a pull-cord switch with a ring attached by which the light may be turned on for a brief period and then automatically turned off. Activation of the pressure or pull-cord switches, in addition to making the light turn on and off, also causes the figure's eyes to raise and lower simultaneously with turning the light on and off.

Defendant's exhibit A was operated in a darkened room and in artificial light, and was found to emit illumination typical of a night-light. *Cf. The Ashflash Corporation* v. *United States, supra; Amico, Inc.* (*Formerly Known As: Exhibit Sales, Inc.*) v. *United States, supra.* Although defendant asserts (brief, p. 7) that its sample (exhibit A) illuminates for only three seconds, my examination revealed that when

[2] Batteries were not included in the importations.

the sample was lifted from a surface and held in the hand, it remained illuminated indefinitely, and when the pull-cord switch was utilized, it remained illuminated for approximately fifteen seconds.

Each Nite-timer is packaged for retail sale in a cardboard box, upon which is prominently printed:

RAGGEDY ANDY t.m.
NITE-TIMER t.m.

THE AUTO-MAGIC
BOY & GIRL
NITE-TIME LIGHT

PORTABLE!
TAKE IT,
CARRY IT,
ANYWHERE!

PICK ME UP . . .
LIGHT GOES ON . . .
EYES OPEN WIDE!

FOR AGES
4 & OVER

PUT ME DOWN . . . .
LIGHT GOES OFF
. . . . . EYES CLOSE!

BATTERY OPERATED
Requires 2 "D"
Cell batteries
(not included)

SET TIMER . . . . . .
RAGGEDY ANDY KEEPS
HIS LIGHT ON UNTIL
YOU'RE SAFELY IN
BED . . . . AND HE
GOES TO SLEEP WITH
YOU!

Significantly, nowhere on the package is the merchandise referred to as a "doll".

III.

Turning now to the legal aspects, plaintiff contends that the night-light feature makes the imported articles "more than" dolls and properly classifiable under item 688.40, TSUS, as electrical articles, not specially provided for. Further, plaintiff argues that the articles covered by entry No. K436738 are more specifically provided for under item 688.40, TSUS, than under item 772.15, TSUS.

Defendant's position is that the articles *in all three entries* are classifiable as dolls under item 737.20, TSUS; and that respecting entry No. K436738, plaintiff's claim under item 688.40 should be overruled *without affirming the classification under item 772.15*, TSUS.[3]

[3] In its answer, defendant interposed two alternative classifications: Item 737.20, TSUS (entry No. K436738 only), and item 653.30, TSUS, providing for illuminating articles of base metal. However, in its cross-motion, defendant does not urge the latter classification.

Additionally, defendant contends that if, as argued by plaintiff, the articles are "more than" dolls, then they are likewise more than electrical articles.

After careful consideration of the pleadings, the uncontradicted affidavit submitted by plaintiff (defendant submitted no supporting or opposing affidavit), the exhibits and the memoranda of law filed by the parties, I have no difficulty in concluding that there is no genuine issue as to any material fact, and that summary judgment should be rendered sustaining plaintiff's claim under item 688.40, TSUS.

IV.

We first address the issue of whether the imported articles are dolls as classified by the Government (in two of the three entries), or "more than" dolls as claimed by plaintiff.

Plaintiff argues that "[e]ven if it is concluded that the nitetimers can function as dolls, one simply cannot ignore the fact that they are also night lights" (brief, p. 4). The thrust of defendant's position is that item 737.20, TSUS, is an *eo nomine* provision which covers all forms of dolls, and that "[t]he merchandise is a doll with an illuminating capacity hidden within it which may or may not be used but, when used, merely increases the play value of the doll" (brief, p. 21).

The law governing this case is succinctly enunciated in a recent decision, *Amico, Inc.* v. *United States*, *supra*, wherein one of the issues determined was whether the merchandise constituted a "music box" within the meaning of item 725.50, TSUS, or "more than" a music box by reason of the presence of a dancing couple. Respecting the "more than" doctrine, Judge Maletz commented (79 Cust. Ct. at 130–31):

> "It is well settled that merchandise which in fact constitutes more than a particular article or which has *additional nonsubordinate* or *co-equal* functions is not classifiable as that article." [Emphasis added.] Sturm, *A Manual of Customs Law* (1974), p. 298, and cases cited. Put otherwise, "[t]here has recently been a spate of cases in the Customs Court involving the 'more than' doctrine. It has been applied in cases where the article was found to have two coequal functions or *where a second function was not incidental, subsidiary or auxiliary.*" Sturm, *A Manual of Customs Law* (Supp. 1976), p. 72.
>
> *The question, therefore, is whether the dancing couple provides an incidental or subsidiary function*, as argued by plaintiff, or whether the dancing couple provides a nonsubordinate function, i.e., a function which is not incidental or subsidiary, as argued by defendant. For the reasons that follow, the court concludes that the function of the dancing couple is not incidental or subsidiary and that the imported articles are therefore "more than" music boxes. [Emphasis added in part].

In light of the foregoing, the nub of the issue here is whether the night-light function of the imported articles may be considered as an incidental, subsidiary, or auxiliary function of a "doll", as that term has been construed and applied by the court.

The question of what constitutes a "doll" has been before the court on many occasions. In *Russ Berrie & Co., Inc.* v. *United States*, 76 Cust. Ct. 218, C.D. 4659, 417 F. Supp. 1035 (1976), *appeal dismissed*, 63 CCPA 125 (1976), Judge Maletz reviewed a long line of decisions construing the tariff provision for dolls, and several lexicographical authorities, and made the following observations (76 Cust. Ct. at 223–25):

> It is well established in customs jurisprudence that the tariff provision for dolls is not a use provision but an *eo nomine* provision. *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, 73–4, C.A.D. 639 (1957); *Louis Wolf & Co., Inc.* v. *United States*, 15 Cust. Ct. 156, 161, C.D. 963 (1945); *The American Import Company* v. *United States*, 22 Cust. Ct. 51, 53, C.D. 1158 (1949); *Barum Co., Inc.* v. *United States*, 30 Cust. Ct. 414, 417, Abs. 57251 (1953).
>
> Equally well established is the concept that a doll for tariff purposes is not confined to playthings for children but includes, a wide range of other articles including but not limited to dolls for ornamentation such as boudoir dolls, souvenir or prize dolls, dolls for display or advertising purposes, and dolls sold as gag items, bar gadgets, adult novelties, etc. *Louis Wolf & Co., Inc.* v. *United States*, *supra*, 15 Cust. Ct. at 157, 158; *Gold-Silver & Co.* v. *United States*, 35 Cust. Ct. 246, 247, Abs. 59301 (1955). * * *
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> * * * * * * *
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> As we have seen, the common meaning of the word "doll" encompasses a great variety of merchandise. Perhaps because the variety is so vast, the courts have not been able to render a comprehensive definition of the term "doll," nor have they been able to ". . . make any all-embracing finding as to what is a doll or to hold that all small figures are dolls . . . ." [Footnote omitted.] Nonetheless, there does appear to be a certain amount of agreement among the lexicographical authorities. To illustrate, we start with the following lexicographic authorities to which reference was made in *Louis Wolf & Co., Inc.* v. *United States* *supra*, 15 Cust, Ct. at 160:
>
> > . . . [W]e are of opinion that the common meaning of that term [doll] is sufficiently comprehensive to include all dolls, whether or not they are toys. In support of this view, it will be noted that the secondary definition of "doll" as given in Webster's New International Dictionary, 2d Edition, 1936, reads:
> >
> > * * * any similar figure for play or *ornament*. [Italics supplied.]

> This broader view is further borne out by a comprehensive article on the subject of dolls appearing in the Encyclopaedia Britannica, 14th Edition, wherein the history, development and use of various types of dolls are set forth in detail, indicating besides their use as playthings for children, wide use in religious rites and other ceremonies in many parts of the world from earliest times to the present day.

More recent lexicographical authorities agree that the word "doll" encompasses a broad spectrum of articles which are commonly known as dolls. Thus in *Webster's New International Dictionary* (2d ed., 1953) p. 767, a doll is described as:

> doll * * * 2. A child's puppet; esp., a toy baby for a child; any similar figure for play or ornament.* * *

In Vol. 9 *Encyclopedia Americana* (Internat. ed., 1973) p. 255, a doll is described as:

> DOLL, a figurine of a human being. The word was first used for the child's toy about 1700, possibly as a contraction of Greek eidolon ("idol"), but more probably from the girl's name "Doll" which was short for "Dorothy." Some authorities now use the word only to refer to the child's toy. Other classes of dolls include religious figurines, objects of art and *souvenirs*. [Emphasis added.]

In Vol. 8 *Collier's Encyclopedia* (1973 ed.) p. 313, a doll is described as:

> DOLL, a plaything usually in the form of a baby or child, widely cherished by small girls; also, the ornamental figurines collected by adults as objects of art, curios, *keepsakes*, or *souvenirs*. [Emphasis added.]

Plainly, then, the figures representing Raggedy Ann or Andy, *standing alone*, respond to the common meaning of the term "doll". Nevertheless, the evident design, purpose and function of the articles as portable night-lights cannot be ignored. The major selling feature of the articles, clearly, is "THE AUTO-MAGIC NITE-TIME LIGHT". In my view, such feature is not incidental, subsidiary, or auxiliary to the use of the articles as "dolls", as that term is commonly used.

Significantly, too, the merchandise is not sold, marketed, or advertised as dolls (Hughes' affidavit, par. 10). Neither the descriptive representations contained in plaintiff's sales catalog (exhibit A attached to the complaint), nor those prominently printed on the retail packaging (portions of which have been quoted previously), refer to the merchandise, or any part thereof, as a doll.

Under these circumstances, defendant's contention that the articles are dolls with an incidental illuminating capacity to enhance their play value is totally without foundation. Although as pointed out in *Russ Berrie* the tariff provision for dolls has been broadly construed

to encompass a wide variety of articles, none of the definitions quoted or cases cited therein establish that the common meaning of the term "doll" is broad enough to encompass the instant night-lights h used as Raggedy Ann and Andy figures.

Cragstan Corporation v. *United States*, 51 CCPA 27, C.A.D. 832 (1963), is somewhat analogous to the present case. There, a "Baby in Walker", consisting of a miniature of a clothed baby doll about 10 inches in height supported in an upright position by a metal walker, was held to be "[o]bviously * * * something more than just a figure or image of an animate object". As the rationale for its holding, the Court of Customs and Patent Appeals stated (51 CCPA 29–30):

> * * * The walker is not incidental—just a brace to hold the baby doll upright—the walker gives the toy its unique and distinctive character and without it the toy would be merely another baby doll. The toy, as an entity, consists of two components, both equally essential, the baby doll and the walking mechanism, the latter having wheels and part thereof being permanently attached to the baby doll. The walking mechanism is an integral part of the toy. * * *
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> * * * * * * *
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> * * * The logical conclusion of appellant's argument is that a baby doll should be classified in the same category as a baby doll in a walker and since a baby doll in a walker is an entirely different toy than without the walker, we believe that it was not the intention of Congress that they both have the same classification.

Here, too, the merchandise consists of two components, both equally essential: the housing in the form of a doll, and the electrical or illuminating components which give the article its unique and distinctive character without which the article would be no more than another Raggedy Ann (or Andy) doll. Further, to paraphrase what our Appellate Court stated in *Cragstan*, since the present article with a function as a night-light is an entirely different article than a doll, which does not possess that function, I am clear that it was not the intention of Congress that they both have the same classification.

In sum, the articles in issue are not merely dolls, nor do the imported articles comprise dolls of which the illuminating feature is merely incidental. Rather, it is emphasized that the imported articles uniquely incorporate into one integral unit the separate functions of two articles (doll and night-light), thus constituting a new commercial article—a "Nite-timer"—with a distinctive and unique character of its own. Considering the "design, character, and purpose" of the imported articles as both a doll and as a night-light, their classification under item 737.20, TSUS, which covers solely the doll component, is plainly

precluded. *Cf. Clutsom Machines, Inc.* v. *United States*, 21 Cust. Ct. 30, 37. C.D. 1122 (1948).

Defendant urges that since the imported articles could be used in the daytime as dolls without utilizing their illuminating feature, the application of the "more than" doctrine is precluded.[4] This contention is also without merit. In *Sherriff-Guerringue, Inc.* v. *United States*, 62 Cust. Ct. 711, C.D. 3852 (1969), musical bubble-blowing saxophones, incorporating into one integral unit the separate functions of a toy saxophone and a child's bubble pipe, were held to be "more than" a toy musical instrument under item 737.60, TSUS, and properly classified as toys, not specially provided for under item 737.90, TSUS.

Respecting the use of the bubble-blowing mechanism, which plaintiff asserted was an incidental feature of the article, the court commented (62 Cust. Ct. at 713–15):

> * * * the presence of the bubble-blowing apparatus clearly makes the article *more than* a toy musical instrument. For the record establishes (as we have seen) that the bubble-blowing mechanism is an integral and non-segregable part of the article, and that this mechanism and the musical part each constitutes an essential component of the finished article. In other words, the article before us incorporates into one integral unit the separate function of two separate toys—a toy saxophone and a child's bubble pipe, and thus constitutes a new commercial article with an unique and distinctive character of its own. "An article will be excluded from its normal provision when, by virtue of joinder with another article, it becomes an inseparable part of a multifunction entity. That is to say, when the change undergone is no longer merely an evolutionary advance or the addition of a subsidiary auxiliary part, the changed article becomes more than that which it formerly was." *V. Alexander & Company, Inc.* v. *United States*, 59 Cust. Ct. 510, 514, C.D. 3212, 276 F. Supp. 573, 576 (1967). See also *Garrard Sales Corp.* v. *United States*, 35 CCPA 39, C.A.D. 369 (1947) (combination phonograph and radio held not to be a phonograph); *A. Tanzi Engineering Co., Schneider Bros. & Co., Inc.* v. *United States*, 30 Cust. Ct. 4, C.D. 1490 (1952) (machine that both cuts and rolls pastry dough is more than either a cutter or roller); *Kaufman & Vinson Co.* v. *United States*, 44 Cust. Ct. 238, C.D. 2180 (1960) (combination map-measurer and magnetic compass is more than a measuring instrument).
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> * * * * * * *

Plaintiff, however, adverts to the testimony of its witness that in over 50 percent of the purchases that he has seen at fairs and dime stores, the children did not buy the bubble solution and were not observed using the bubble-blowing feature. From this plain-

[4] In paragraph 24 of its answer, defendant "avers that the imported articles consist of dolls *chiefly used in the household to illuminate a room at night*". [Emphasis added].

tiff concludes—as did the witness—that the bubble-blowing function is an incidental feature of the article. The argument has little merit. *For the question in a situation like that here is not how the article was actually used but what it was constructed and designed to do.* See e.g., *Dubrow & Hearne Manufacturing Co.* v. *United States*, 9 Ct. Cust. Appls. 148, 152, T.D. 37993 (1919); *United-Carr Fastener Corporation* v. *United States*, 56 Cust. Ct. 347, 351–52, C.D. 2648 (1966). [Emphasis added].

Here, too, the imported article notwithstanding its characteristics as a doll, was constructed and designed to be used as a night-light, and it is immaterial to what extent it was actually used for that purpose.

The merchandise in the present case may be contrasted to that in *Astra Trading Corp.* v. *United States*, 56 Cust. Ct. 555, C.D. 2703 (1966), wherein Judge Ford, writing for the Second Division, held that a screwdriver with a flashlight component for illumination was not more than a screwdriver due to the presence of the illuminating feature. Respecting the "more than" issue, the court stated (56 Cust. Ct. at p. 561):

> The decision in *United States* v. *A. W. Fenton Company, Inc.*, 49 CCPA 45, C.A.D. 794, cited by plaintiff, is distinguishable. In that case, the imported article contained a motor which also embodied gears and a frame which served as a housing for other parts of the floor polisher. The additional features made the article more than a special type of a motor since it formed part of the assembly of the floor polisher. *The rationale of the A. W. Fenton decision, supra, would be applicable herein if the record showed that the article had a use in addition to its use as a screwdriver.* However, plaintiff's own witness, when questioned as to the purpose of the importation, stated, without qualification, that the article was "designed specifically to be used as an illuminated screwdriver," and "the purpose of this entire item is to be used as a screwdriver * * *."
>
> * * * We do not believe that the additional feature of illumination transforms the basic purpose of the imported article from use as a screwdriver into some other use; *nor do we believe that the illuminating feature gives the article a use in addition to its intended use as a screwdriver.* For, illumination notwithstanding, the article remains essentially a device restricted to the use of turning screws, i.e., a screwdriver. * * * [Emphasis added].

Significantly, the illuminating feature of the screwdriver in *Astra* merely assisted or facilitated the screw-turning function, whereas in the present merchandise the illuminating feature performs a function as a night-light, which is independent of any function or use the articles may have as a doll. And unlike such features commonly incorporated in dolls as mechanisms that create tears, cause the arms or legs to move, produce a voicelike sound, or otherwise contribute

to a lifelike simulation,[5] the illuminating feature of the instant articles does not in the least contribute to a lifelike simulation. On the contrary, the illumination feature was solely intended to make the articles useful *in the dark* as a night-light, a function mutually exclusive of the articles' use as dolls.

Similarly, the imported articles are not at all analogous to the figurines in *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, C.A.D. 639 (1957), which were dedicated to exclusive use as dancing dolls for a music box.

V.

Having determined that the imported articles are more than dolls, we now turn to plaintiff's claim that the merchandise is properly dutiable as "Electrical articles * * * not specially provided for" under item 688.40, TSUS. Fundamentally, of course, even though a plaintiff has established that the Government's classification is erroneous, the plaintiff has the burden of proving the correctness of its own claimed classification. *Amico, Inc.* v. *United States, supra.*

Central to the dispute respecting plaintiff's claim is whether the description "electrical articles" in item 688.40, TSUS, fully describes the imported articles. Defendant advances the argument that item 688.40 "does not describe the entire article, but only an interior element" (brief, p. 25). Such argument is untenable.

Obviously, the description "electrical articles" is broad enough to encompass not merely an interior electrical element, but also any exterior housing or casing enclosing such element. Here, the Raggedy Ann and Andy figures serve as the exterior housing for the night-lights, and consequently the imports are not more than "electrical articles", as urged by defendant.

VI.

Defendant also insists that the imported articles cannot be used as night-lights because, by definition, night-lights provide illumination of long duration, and are intended to be stationary. However, defendant has overlooked that the Tariff Commission (now International Trade Commission) recognizes there are portable "night-lights" with a self-contained electric source, which are "designed to light automatically when lifted off a surface and switch off when set down again". See *Summaries of Trade and Tariff Information*, Sched-

[5] In *Brechner Bros.* v. *United States*, 58 Cust. Ct. 272, 275, C.D. 2959 (1967), the court observed: "Certainly the court can take judicial notice of the fact that technological advances have visited the dollmaking business to the extent that walking, talking, and crying dolls of all sizes and shapes permeate the modern market places. The extent and degree of imaginative and *lifelike features* incorporated in these products are sometimes almost incredible." (Emphasis added).

ule 6, Vol. 10 (1969), p. 216.[6] The "Nite-timers", of course, meet that description.

VII:

Finally, as pointed out by Judge Rich, writing for the Court of Customs and Patent Appeals in *The Englishtown Corp.* v. *United States*, 64 CCPA 84, C.A.D. 1187, 553 F.2d 1258 (1977), in applying the "more than" doctrine, only the most general rules can be ascertained from the previous decisions, and each case must in the final analysis be determined on its own facts. See also *United States* v. *Mobay Chemical Corporation*, 65 CCPA —, C.A.D. 1206, 576 F. 2d 368 (1978). Predicated upon the undisputed facts in this case, I find that the imported articles possess a "second significant function" justifying the application of the "more than" doctrine. *Cf. United States* v. *Oxford International Corp.*, 62 CCPA 102, 105, C.A.D. 1154, 517 F. 2d 1374 (1975). Therefore, the imported articles are more than dolls, as provided for in item 737.20, TSUS, and are classifiable as electrical articles, not specially provided for under item 688.40, TSUS. The provision in item 688.40, TSUS, is more specific than item 772.15, TSUS, the provision under which the merchandise was classified by the Government in entry No. K436738. *Prestigeline (Div. of Weiman Co., Inc.)* v. *United States*, 75 Cust. Ct. 139, C.D. 4618, 406 F. Supp. 532 (1975). Hence, plaintiff's motion for summary judgment is granted, and defendant's cross-motion is denied. Judgment will be entered accordingly.

(C.D. 4749)

UNITED MERCHANTS & MANUFACTURERS, INC. *v.* UNITED STATES

Memorandum Opinion and Order on Cross-Motion to Dismiss

Court No. 76-3-00547

Port of Norfolk

[Action dismissed.]

(Dated June 8, 1978)

Vandeventer, Black, Meredith & Martin (*G. W. Birkhead* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Edmund F. Schmidt*, trial attorney), for the defendant.

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[6] According to the *Summaries*, *supra*, item 683.80, TSUS, covering portable electric lamps with self-contained electric source (other than flashlights) specifically encompasses *portable night-lights*. But, item 683.80, TSUS, is not asserted by either plaintiff or defendant. Plaintiff's position is that although the merchandise is more than a doll, it is similarly more than a portable night-light, and "[t]he one tariff provision which fully describes the subject articles, notwithstanding their dual function character, is Item 688.40, TSUS, as claimed by the plaintiff". (Brief, p. 9).

LANDIS, Judge: Plaintiff has filed motion to amend the summons heretofore filed herein by adding two omitted protest numbers. Defendant has filed opposition and cross-motion to dismiss the entire civil action for lack of jurisdiction setting up *inter alia* that plaintiff has not filed a timely original summons with this court.

The facts are undisputed: In this case, notice of the denial of the protest was mailed on August 25, 1975. Plaintiff's summons was filed on February 27, 1976, the 186th day after the mailing of the denial. 28 U.S.C. § 2631(a) is unequivocal: "An action over which the court has jurisdiction . . . is barred unless commenced within one hundred and eighty days after: (1) the date of mailing of notice of denial . . . ".

This action is dismissed.

(C.D. 4750)

GENE MILLER, a/c J. J. CAMILLO SEAFOODS BROKERAGE CO. *v.* UNITED STATES

Court No. 74-11-03244

Port of Los Angeles

J. J. CAMILLO SEAFOOD BROKERAGE *v.* UNITED STATES

Court No. 75-3-00552

Port of Los Angeles

J. J. CAMILLO, INC. *v.* UNITED STATES

Court No. 76-11-02537

Port of San Diego

Boiled baby clams—American selling price—Export value

[Judgment for defendant.]

(Decided June 9, 1978)

Stein, Shostak, Shostak & O'Hara, Inc. (*John N. Politis* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Bruce M. Mitchell*, trial attorney), for the defendant.

MALETZ, Judge: A joint trial of these actions was held. At this trial, after plaintiffs had completed the presentation of their evidence, defendant moved for dismissal of the actions pursuant to rule 8.3(c)

on the ground that on the facts and the law plaintiffs had failed to prove a *prima facie* case. The court granted defendant's motion to dismiss. In conformity with rule 8.3(c) the court makes the following findings of fact and conclusions of law stating the reasons and facts upon which judgment on the merits against the plaintiffs—which is hereby entered—is based.

Findings of Fact

1. The merchandise at issue consists of boiled baby clams packed in 10 oz. or 27½ oz. tins.

2. The merchandise was exported from Japan on November 12, 1971; July 30, 1972; March 2, 1973; or April 23, 1976.

3. The merchandise does not appear on the Final List of the Secretary of the Treasury, T.D. 54521.

4. The merchandise was appraised on the basis of American selling price as defined in section 402(e) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

5. Plaintiffs contest the use of American selling price as the basis of appraisement, claiming that no like or similar merchandise was produced in the United States at the time of exportation of the imported merchandise and that the imported merchandise should have been appraised on the basis of export value as defined in section 402(b) of the Act at the invoice unit values, packed, less ocean freight, hauling, and lighterage.

6. The court is pretermitting the issue of whether the plaintiffs have sustained their burden of overcoming the presumption of correctness and is making no finding with respect thereto.

7. At trial, plaintiffs fails to prove *prima facie* that at the time of exportation to the United States of the merchandise undergoing appraisement, the invoice unit values, packed, less ocean freight, hauling and lighterage, were the prices at which such or similar merchandise was freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, as contemplated in section 402(b).

Conclusions of Law

1. The court has jurisdiction of these actions pursuant to 28 U.S.C. 1582(a).

2. The protests covered by the civil actions were timely filed and the actions were timely commenced.

3. Under 28 U.S.C. 2635, the decision of the appraising officer is presumed to be correct and the burden to prove otherwise rests upon the parties challenging the decision. In these cases, plaintiffs

had the burden of overcoming the presumption by establishing, through competent and sufficient evidence, that export value rather than the American selling price is the correct statutory basis of appraisement and that their claimed values represent the proper export value for the imported merchandise.

4. The court makes no determination as to whether plaintiffs have overcome the presumption of correctness of the American selling price basis of appraisement, and is pretermitting that issue.

5. Plaintiffs have failed to prove *prima facie* that the invoice unit prices less ocean freight, hauling and lighterage were the prices at which such or similar merchandise was freely sold, or, in the absence of sales, offered for sale in the principal markets in Japan, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, pursuant to section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

6. For the foregoing reasons, the appraised values are hereby affirmed.

(C.D. 4751)

ARMSTRONG BROS. TOOL CO.; BERGMAN TOOL MANUFACTURING CO., INC.; DURO METAL PRODUCTS COMPANY; MILWAUKEE TOOL & EQUIPMENT CO., INC.; PROTO TOOLS DIVISION, INGERSOLL RAND COMPANY; WARREN TOOL CORPORATION; WILTON TOOL DIVISION OF WILTON CORPORATION; AND WOODINGS-VERONA TOOL WORKS

v.

UNITED STATES (GREAT NECK SAW MANUFACTURING, INCORPORATED, PARTY-IN-INTEREST)

Opinion and Order on Defendant's Motion to Strike

Court No. 77-8-02004

Port of New York

[Defendant's motion to strike denied; plaintiffs' action dismissed in part, but without prejudice.]

(Dated June 15, 1978)

Stewart & Ikenson (*Frederick L. Ikenson* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William L. Atkin*, trial attorneys), for the defendant.

NEWMAN, Judge: This is an American manufacturers' action brought pursuant to 28 U.S.C. § 1582(b) (1970), 28 U.S.C. § 2632(a)

(Supp. V 1975) and 19 U.S.C. § 1516(c) (Supp. V 1975), involving the Antidumping Act of 1921, as amended (19 U.S.C. §§ 160, *et seq.* (1970 and Supp. V 1975)) (Antidumping Act).

Plaintiffs allegedly are domestic manufacturers and/or wholesalers of certain hand tools, viz., chisels, punches, hammers and sledges, vises, c-clamps and battery service tools. The party in interest, Great Neck Saw Manufacturing, Incorporated, is the consignee in New York Seaport Entry No. 77–471887, of July 20, 1977, who imported hand tools falling within the class or kind of merchandise involved in this action without assessment of antidumping duties, and who has been made a party pursuant to 19 U.S.C. § 1516(c).[1]

Defendant has moved, ostensibly under rule 1.1(b), to strike portions of plaintiffs' complaint (paragraphs 7, 9 through 11, and parts of the prayer for relief) on jurisdictional grounds, and to compel plaintiffs to file an amended complaint.

1.

At the outset, it would be helpful to summarize briefly the jurisdictional bases for the instant action.

28 U.S.C. § 1582(b) grants to the Customs Court exclusive jurisdiction of civil actions brought by American manufacturers, producers or wholesalers pursuant to 19 U.S.C. § 1516. Additionally, 28 U.S.C. § 2632(a) reads:

> (a) A party may contest * * * a decision of the Secretary of the Treasury made under section 516 of the Tariff Act of 1930, as amended, * * * by bringing a civil action in the Customs Court. A civil action shall be commenced by filing a summons in the form, manner, and style and with the content prescribed in rules adopted by the court.

Section 1516(c) provides, *inter alia*, that an American manufacturer, producer or wholesaler may contest the nonassessment of antidumping duties by the Secretary of the Treasury (Secretary).

In *Voss International Corp.* v. *United States*, 78 Cust. Ct. 130, 131, n. 1, C.D. 4698, 432 F. Supp. 205 (1977), Judge Maletz succinctly summarized the salient provisions of the Antidumping Act and the procedures applicable thereunder:

> The Antidumping Act provides in general that if a foreign exporter sells merchandise to the United States at a price less than its "fair value," i.e., the price charged by the exporter in his home market—with resultant injury to a U.S. industry—a special dumping duty will be assessed upon the importation of

[1] Under 19 U.S.C. § 1516(f) (Supp. V 1975), the consignee or his agent has the right to appear and be heard as a party in interest in an action brought by an American manufacturer pursuant to section 1516. In the present case, however, the party in interest, Great Neck Saw Manufacturing, Incorporated, did not file any papers in connection with the present motion.

the merchandise. If the exporter and importer are not related, this duty is measured by the difference between the higher "foreign market value" and the lower price charged the U.S. importer. The question as to whether merchandise is being sold at less than fair value is determined by the Secretary of the Treasury. If the Secretary makes an affirmative finding in this regard, the question as to whether there is injury is determined by the United States Tariff Commission (now known as the United States International Trade Commission). If the Commission makes a determination of injury, the Secretary makes and publishes a finding of dumping. See, e.g., *F. W. Myers & Co., Inc., et al.* v. *United States*, 72 Cust. Ct. 219, 220, C.D. 4544, 376 F. Supp. 860, 862 (1974).

2.

As mentioned in *Voss International Corp.*, under the Antidumping Act, if the Secretary makes an affirmative finding with respect to sales at less than fair value (LTFV), the question as to whether there is injury will then be determined by the International Trade Commission (Commission). Here, the Commission's notice of a negative injury determination, dated December 2, 1975 and published in the Federal Register (40 FR 57517 (1975)), discloses the background of this litigation, so far as pertinent to the present motion:

> On September 2, 1975, the United States International Trade Commission received advice from the Department of the Treasury that certain nonpowered hand tools from Japan, that is, chisels, punches, hammers and sledges (with or without handles), vices, c-clamps, and battery service tools, other than hammers from Imoto Hamono Co., Ltd., and Kyoto Tool Co., Ltd., sledges from Hirota Tekko K.K., and battery service tools from Tashiro Seisakusho and Japan Export Brush Co., Ltd., are being, or are likely to be, sold in the United States at less than fair value within the meaning of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)). Accordingly, on September 10, 1975, the Commission instituted investigation No. AA1921–149 under section 201(a) of said act to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such nonpowered hand tools into the United States. Subsequently, on October 15, 1975, the Department of the Treasury amended its determination so that the only battery service tools covered thereby are battery terminal lifters. The Commission, therefore, on October 23, 1975, amended the scope of its investigation to make it correspond with the advice received.
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> * * * * * * *
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> The United States International Trade Commission has unanimously determined that an industry in the United States is not being injured or is not likely to be injured, or is not prevented from being established, by reason of the importation of chisels, punches, hammers and sledges (with or without handles), vises,

c-clamps, and battery terminal lifters from Japan that are being, or are likely to be, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.

The Secretary's amended LTFV determination of October 15, 1975 (40 FR 49111 (1975)) effectively terminated the antidumping proceeding respecting the battery service tools, other than battery terminal lifters. Therefore, unlike the other merchandise which is also the subject of this civil action, there was no negative injury determination made by the Commission relating to the battery service tools, other than battery terminal lifters.

3.

After filing a petition with the Secretary and complying with the other conditions precedent to the initiation of litigation in the Customs Court prescribed by 19 U.S.C. § 1516 (a) and (c),[2] plaintiffs commenced this action on August 22, 1977 challenging the Commission's negative injury determination (40 FR 57517 (1975)) (hereafter "first issue"), and the action allegedly taken by the Commission, Commission staff, and the Secretary respecting certain battery service tools, other than battery terminal lifters. These tools were originally encompassed in the Secretary's LTFV investigation and affirmative determination (40 FR 41155 (1975)), but were subsequently excluded from the antidumping proceeding (40 FR 49111 (1975)) (hereafter "second issue").[3] Specifically, plaintiffs' summons sets forth the following claims:

> The Secretary of the Treasury erred, as a matter of law, by amending his less than fair value determination in the case of certain nonpowered hand tools from Japan so as to exclude from the term "battery service tools" all tools other than battery terminal lifters. The International Trade Commission erred, as a matter of law, by eliminating from the class or kind of merchandise under investigation in the subject Antidumping Act case all battery service tools other than battery terminal lifters, and by concluding that an American industry was not being or likely to be injured or prevented from being established by reason of imported chisels, punches, hammers and sledges (with or without handles), vises, c-clamps, and battery service tools from Japan, sold at less than fair value. The Secretary of the Treasury should have found, as a matter of law, that an American industry was being or likely to be injured or prevented from being estab-

[2] No question has been raised concerning plaintiffs' compliance with the procedural requirements of 19 U.S.C. § 1516 (a) and (c).

[3] The term "battery service tools", as used initially by the Secretary and the Commission, included battery terminal lifters, battery post and terminal cleaning brushes, battery-terminal spreaders, angle-nose pliers, booster cables and battery service kits (terminal puller, cleaning brush and two terminals). 40 FR 24218, 41155 and 42607. However, the Secretary amended his affirmative LTFV determination to exclude all battery service tools except battery terminal lifters (40 FR 49111); and subsequently the Commission amended the scope of its injury investigation in conformity with the Secretary's amended LTFV determination, excluding the battery service tools, other than battery terminal lifters (40 FR 50320).

lished by reason of the aforedescribed imported merchandise from Japan, sold at less than fair value; he should have published a finding of dumping with respect to the aforedescribed imported merchandise from Japan; the subject entry should have been appraised in accordance with the Antidumping Act of 1921, and therefore, the foreign market (or constructed) value and the purchase (or exporter's sales) price should have been ascertained, and, further, to the extent that the foreign market (or constructed) value exceeded the purchase (or exporter's sales) price, antidumping duties should have been assessed.

On September 27, 1977, plaintiffs filed their complaint alleging the following in paragraphs 7 and 9 through 11:

7. Between the date of the aforedescribed Determination of Sales at Less Than Fair Value and the Commission hearing, the Commission staff asked the Treasury Department to amend its Determination of Sales at Less Than Fair Value by eliminating from the scope thereof all battery service tools other than battery terminal lifters. The Treasury Department accommodated the Commission staff and on October 21, 1975, the Assistant Secretary of the Treasury published in the Federal Register an Amendment of Determination of Sales at Less Than Fair Value consistent with the Commission staff request (40 Fed. Reg. 49111). The Commission, on October 23, 1975, the second day of the hearing, amended the scope of its investigation to make it correspond with the new advice received from the Treasury Department, and on October 29, 1975, published in the Federal Register notice of the amendment of investigation (40 Fed. Reg. 50320).

* * * * * * *

9. The Commission staff, in requesting the Treasury Department to modify its Determination of Sales at Less Than Fair Value, acted arbitrarily and in excess of its authority.

10. The Treasury Department, in modifying its Determination of Sales at Less Than Fair Value, acted arbitrarily and in excess of its authority.

11. The Commission, in eliminating battery service tools other than battery terminal lifters from the scope of its investigation and determination, acted arbitrarily and in excess of its authority

In their prayer for relief, plaintiffs seek:

* * * that this Honorable Court (1) determine that the negative injury decision of the International Trade Commission in the case of chisels, punches, hammers and sledges, vises, c-clamps, and battery terminal lifters from Japan, reported at 40 Fed. Reg. 57517 (1975), was erroneous, as a matter of law, and that, as a matter of law, an American industry was being or was likely to be injured or prevented from being established by reason of imports of chisels, punches, hammers and sledges, vises, c-clamps, and battery service tools from Japan sold at less than fair value; (2) direct the Secretary of the Treasury to publish a finding of dumping in the matter of chisels, punches, hammers and sledges, vises, c-clamps, and battery service tools from Japan, forthwith: (3) direct the Regional Commissioner at New York (a) to as-

certain the foreign market (or constructed) value and the purchase (or exporter's sales) price of any chisels, punches, hammers and sledges, vises, c-clamps, and battery service tools from Japan covered by New York Seaport Consumption Entry No. 77-471887 of July 20, 1977, and (b) if and to the extent that the foreign market (or constructed) value exceeds the purchase (or exporter's sales) price, to assess antidumping duties; and (4) provide any other relief which this Honorable Court deems just and proper.

4.

As indicated at the outset, this case is presently before the court on defendant's motion to strike portions of the complaint. Specifically, defendant's motion is directed to paragraphs 7, 9 through 11 and the references in the prayer for relief to battery service tools other than battery terminal lifters. The predicate of defendant's motion is that the court lacks jurisdiction over the second issue raised by the complaint involving the battery service tools other than battery terminal lifters.

Defendant contends that the Secretary's amendment of his LTFV determination on October 15, 1975 (40 FR 49111) was a negative LTFV determination respecting battery service tools, other than battery terminal lifters, which was reviewable solely under 19 U.S.C. § 1516(d). Continuing, defendant argues that although "[s]ection 516(c) establishes a cause of action pursuant to which an American manufacturer may contest, *inter alia*, a negative International Trade Commission determination as to injury under the Antidumping Act, * * * in this case, the International Trade Commission did not reach a negative injury determination as to battery service tools other than battery terminal lifters because the final LTFV determination made by the Secretary of the Treasury, pursuant to 19 U.S.C. § 160, did not include battery service tools other than battery terminal lifters."

Plaintiffs insist that defendant's motion to strike should be denied as procedurally incorrect, since the jurisdictional question relating to the second issue in plaintiffs' complaint should have been raised by a motion to dismiss. Respecting the merits of the jurisdictional question raised by defendant's motion, plaintiffs urge that "*if it is determined that the Customs Court has jurisdiction to review negative injury determinations under the language of section 516(c)*, the Court also must have jurisdiction to review the kind of alleged wrongdoing by Treasury, the International Trade Commission, and the Commission staff presented as the second issue herein" (plaintiffs' emphasis). Further, plaintiffs advance the argument that Congress did not intend a construction of the statute "requiring plaintiffs to fractionate its litigative efforts—by first contesting the truncation issue in a section 516(d) proceeding, and then contesting the negative injury determination in a section 516(c) proceeding * * *".

5.

As previously noted, defendant suggests that its motion to strike is authorized by rule 1.1(b), which so far as pertinent reads: "* * * Where, in any proceeding or in any instance, there is no applicable rule of procedure, the judge or judges, before whom the action is pending, may prescribe the same".

I agree with plaintiffs' contention that defendant's motion to strike is procedurally inappropriate. Under rule 4.7(b)(2), defendant is provided with the defense of lack of jurisdiction of the subject matter. Inasmuch as defendant's motion contests the jurisdiction of the court to adjudicate the second issue in plaintiffs' complaint, defendant's motion is essentially one for dismissal of the action in part for lack of subject matter jurisdiction pursuant to rule 4.7(b)(2), and I shall so treat it.[4] *Cf. SCM Corporation* v. *United States* (*Brother International Corporation Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78-2 (1978).

6.

The court's jurisdiction under 19 U.S.C. §1516(c) to review the Commission's negative injury determination (40 FR 57517 (1975)) is not in dispute. In view of Chief Judge Re's recent exhaustive and well-reasoned opinion in *SCM*, discussed *infra*, there can be no doubt that the Customs Court, rather than the District Court, has exclusive jurisdiction to review a negative injury determination by the Commission under the Antidumping Act. Hence, the sole matter for decision is whether the second issue in plaintiffs' complaint is properly within the purview of subsection (c). In resolving this issue, it is appropriate to first examine the language of the pertinent statutory provisions. Thus, 19 U.S.C. §1516 (a), (c) and (d), so far as pertinent, read:

> (a) * * * The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish * * * the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duties"), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes * * * antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that * * * antidumping duties should be assessed.
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> * * * * * * * *

[4] *Cf.* Fed. R. Civ. P. 12(h)(3), applicable to the district courts, which provides: "(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

(c) * * * If the Secretary decides that * * * antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest * * * the failure to assess * * * antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision * * * that * * * antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the * * * failure to assess * * * antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

(d) * * * Within 30 days after a determination by the Secretary—

> (1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less that its fair value, * * *
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> * * * * * * *
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> an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

It is apparent from the foregoing statutory scheme that while an American manufacturer is limited by subsection (d)(1) to contesting a negative LTFV determination, under subsection (c) the manufacturer may contest the nonassessment of antidumping duties without limitation as to the basis for such nonassessment. Consequently, even assuming *arguendo* that the Secretary's amended LTFV determination was contestable by plaintiffs under subsection (d)(1) as a negative LTFV determination, I see nothing in the obviously broad scope of subsection (c) that precludes plaintiffs from contesting under that provision the Secretary's exclusion of battery service tools (other than battery terminal lifters) from the antidumping investigation, as well as the Commission's negative injury determination reported at 40 FR 57517 (1975).

In *SCM* the Court addressed the issue of whether the plaintiff, an American manufacturer, could contest a negative injury determination by the Commission pursuant to 19 U.S.C. § 1516(c). In seeking to have the action dismissed for lack of jurisdiction, plaintiff in the *SCM* case pointed out that there is no specific statutory provision that expressly grants jurisdiction to the Customs Court to review a negative injury determination by the Commission in an American manufacturer's action, and contended that the language in subsection (c) "failure to assess * * * antidumping duties" provides for contesting only the Secretary's failure to assess antidumping duties. The thrust of the Government's position was that the "failure to assess" language in section 1516(c) includes all preliminary determinations which enter into the Secretary's failure to assess antidumping duties, including the Commission's negative injury determination.

In sustaining the Government's position, Chief Judge Re stated as the linchpin of his decision:

> The language of section 516(c) that permits an American manufacturer to contest "the failure to assess * * * antidumping duties" *contains no limitations, and is sufficient to include a challenge to the preliminary determinations that go into a decision to assess, or not to assess, dumping duties.* * * * [Emphasis added].

Plainly, a decision of the Secretary respecting sales at LTFV is just as much a "preliminary determination that goes into a decision to assess, or not to assess, dumping duties", as is the Commission's injury determination. In consonance with Chief Judge Re's rationale in *SCM* "that section 516(c) be interpreted to afford review of *all issues* in antidumping cases" (emphasis added), I must concur with plaintiff's contention here that "if it is determined [in *SCM*] that the Customs Court has jurisdiction to review negative injury determinations under the language of section 516(c), the Court also must have jurisdiction to review the kind of alleged wrongdoing by Treasury, the International Trade Commission, and the Commission staff presented as the second issue herein".

7.

Lastly, we consider this action insofar as plaintiffs seek an injury determination respecting the battery service tools. As may be noted *supra*, the Commission's injury decision reported at 40 FR 57517 (1975) covered chisels, punches, hammers and sledges, vises, c-clamps, and *battery terminal lifters* from Japan, while plaintiff's prayer for relief includes "battery service tools".

As mentioned above, when the Secretary amended his LTFV determination on October 15, 1975 to exclude battery service tools

(other than battery terminal lifters), the antidumping investigation respecting such battery service tools was terminated. Accordingly, as stressed by defendant, there has been no injury determination made by the Commission respecting battery service tools other than the battery terminal lifters. Fundamentally, an affirmative determination of injury as well as sales at LTFV is a condition precedent to a finding of "dumping". *SCM Corporation* v. *United States, supra; Voss International Corp.* v. *United States, supra.* Absent an injury determination by the Commission respecting battery service tools (other than battery terminal lifters), the issue of injury insofar as that merchandise is concerned is not ripe for judicial review. Consequently, plaintiffs' action is dismissed, but without prejudice to renewal insofar as it presently seeks a judicial determination of injury respecting battery service tools not encompassed by the Commission's negative determination of December 2, 1975 (40 FR 57517).

In view of the foregoing observations, it is hereby ORDERED, ADJUDGED AND DECREED:

1. Defendant's motion to strike is denied.
2. Plaintiffs' action is dismissed, but without prejudice to renewal insofar as it presently seeks a judicial review of injury respecting battery service tools not encompassed by the Commission's negative determination of December 2, 1975 (40 FR 57517).
3. Defendant shall serve and file its answer to the complaint herein within fifteen (15) days of the service of this order.

(C.D. 4752)

JACK BRYAN, INC. *v.* UNITED STATES

Beaded parts of women's wearing apparel

Certain beaded parts of women's wearing apparel claimed to be subject to appraisement on the basis of export value at the invoiced unit values, net packed, *held* appraised value, on the basis of constructed value, must stand.

Appraisement which admittedly did not take into consideration the statutory elements set forth in section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, T.D. 54165, is erroneous. *Greb Industries, Ltd.* v. *United States*, 64 Cust. Ct. 608, R.D. 11691, 308 F. Supp. 88 (1970); *Ellis Silver Co., Inc.* v. *United States*, 63 Cust. Ct. 647, R.D. 11688, 308 F. Supp. 704 (1969), *aff'd*, 67 Cust. Ct. 564, A.R.D. 293 (1971), *aff'd*, 60 CCPA 143, C.A.D. 1100, 477 F. 2d 946 (1973).

Where the record establishes it to be a common practice to sell to a selected purchaser, such sales are in the ordinary course of

trade. *Aceto Chemical Co., Inc.* v. *United States*, 51 CCPA 121, C.A.D. 846 (1964).

Sales made to a selected purchaser may be considered to be "freely offered" under the provisions of section 402(f)(1)(B). *D. H. Baldwin Co. et al.* v. *United States*, 65 CCPA 67, C.A.D. 1208 (1978).

Sales made by plaintiff in the United States which were shipped directly from Hong Kong to Mexico and Canada may not be utilized to establish prices "fairly reflect the market value" since such sales to third countries constitute an irrelevant market. *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F. 2d 1400 (1974).

Court No. 76-2-00498

Port of Los Angeles

[Judgment for defendant.]

(Decided June 15, 1978)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

FORD, Judge: This action contests the basis of appraisement and appraised value of certain beaded parts of women's wearing apparel invoiced as style Nos. 750, 1024, 8042X, 8062, 8065, 8067, 8081, 9003 and 9502. Appraisement was made on the basis of constructed value as defined in section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, T.D. 54165. The value found by customs for the merchandise was the invoice unit values, plus 64.89 percent, net packed.

It is the position of plaintiff that the merchandise is subject to appraisement on the basis of export value as defined in section 402(b), Tariff Act of 1930, as amended, *supra*, and the proper dutiable value is the invoiced unit values, net packed. The statutory provisions of section 402, Tariff Act of 1930, as amended, *supra*, covering the merchandise involved provide as follows:

> (b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all

other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

(d) CONSTRUCTED VALUE.—For the purposes of this section, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

* * * * * * *

(f) DEFINITIONS.—For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

* * * * * * *

(4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value, United States value, or

constructed value, as the case may be, can be satisfactorily determined:

(A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.

(D) Merchandise which satisfied all the requirements of subdivision (C) except that it was produced by another person.

The only witness whose testimony was adduced at the trial was Jack Bryan who testified on behalf of the importer. Mr. Bryan is also the owner of the manufacturer, Hung Crafts Company of Hong Kong. In addition, there were received in evidence on behalf of plaintiff nine exhibits and defendant introduced three exhibits. The official papers were also received as an exhibit, without being marked.

The action of Customs in appraising the involved merchandise on the basis of constructed value at the invoiced unit values, plus 64.89 percent, net packed, is presumed to be correct. 28 U.S.C. 2635(a). The burden placed upon plaintiff in challenging this presumption is twofold. Plaintiff must establish by competent evidence that the appraisement is erroneous and affirmatively establish the correct basis and value.

Plaintiff may meet this dual burden by establishing all the elements of export value and the proper dutiable values. This, in effect, would overcome the presumption attaching to the appraisement on the basis of constructed value in view of the statutory preference of export value over constructed value as set forth in section 402(a)(1)(3) of the Tariff Act of 1930, as amended, *supra*. *Majestic Electronics, Inc.* v. *United States*, 63 Cust. Ct. 628, R.D. 11686 (1969).

Alternatively, plaintiff may establish the appraisement to be erroneous and then go forward and establish the correct basis and dutiable value. Plaintiff has chosen this method by the introduction, as plaintiff's exhibit 1, of interrogatories issued pursuant to rule 6.3 of the rules of this court, in an effort to establish how Customs arrived at its appraisement.

The following questions and answers are contained in exhibit 1:

1. Q. In arriving at a constructed value as defined in section 402(d) of the Tariff Act of 1930 as amended, please say what amount was considered for the cost of the materials.—A. An individual amount for costs of materials was not determined in making this appraisement.

2. Q. In arriving at the constructed value as so defined, please state what amount was considered to be the cost of the fabrication.—A. An individual amount for fabrication was not determined in making this appraisement.

3. Q. In arriving at the constructed value as so defined, please state what amount was used for general expenses.—A. An individual amount for general expenses was not determined in making this appraisement.

4. Q. In arriving at the constructed value as so defined, please state what amount was used for profit.—A. An individual amount for profit was not determined in making this appraisement. However, the constructed values do include an 18 percent figure for profit.

5. Q. In arriving at the constructed value as so defined, please state what amount was used for packing.—A. An individual amount for packing was not determined in making this appraisement.

6. Q. Please state whether, in determining the constructed value herein, any amount was included to cover any alleged assists given to the manufacturer by the importer.—A. Yes.

7. Q. If the previous question is answered in the affirmative, please state what you contend was the nature of the assists.—A. Design and pattern costs.

8. Q. If question 6 is answered in the affirmative, please state what amount was included in the constructed value as the value of the alleged assists.—A. An individual amount for assists was not determined in making this appraisement.

While the appraising officer may use "all reasonable ways and means" or "best evidence available" in ascertaining the value, as prescribed by section 500 of the Tariff Act of 1930, as amended by the Customs Courts Act of 1970, and section 402(g), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, *supra*, he may not use a method which contravenes the statutory requirements prescribed by section 402(d), *supra*, under which appraisement was made.

It is evident from exhibit 1 that Customs has disregarded the statutory elements set forth in section 402(d) and therefore the appraisement is erroneous. *Greb Industries, Ltd.* v. *United States*, 64 Cust. Ct. 608, R.D. 11691, 308 F. Supp. 88 (1970); *Ellis Silver Co., Inc.* v. *United States*, 63 Cust. Ct. 647, R.D. 11688, 308 F. Supp. 704 (1969), *aff'd*, 67 Cust. Ct. 564, A.R.D. 293 (1971), *aff'd*, 60 CCPA 143, C.A.D. 1100 (1973).

Mr. Bryan testified the beaders in Hong Kong sold to one selected purchaser, since each purchaser did not desire his designs sold to others in the trade. This, according to the witness, was common practice. Based upon this testimony and the reason for selling to a selected purchaser, the court considers the practice to be in the ordinary course of trade and plaintiff to be a selected purchaser. *Aceto Chemical Co., Inc.* v. *United States*, 51 CCPA 121, C.A.D. 846 (1964).

Defendant contends the record is silent on the statutory language of section 402(f)(1), *supra*, relating to offers for sale. While this is true, the testimony of Mr. Bryan relative to the practice of beaders restricting sales of particular designs to a selected purchaser eliminates the necessity for such evidence. In any event, sales to one or more selected purchasers may be considered to be freely offered under the provisions of section 402(f)(1)(B). *See also D. H. Baldwin Co. et al.* v. *United States*, 65 CCPA—, C.A.D. 1208 (1978).

Plaintiff must, however, establish prices which fairly reflect market value. In an effort to do so, plaintiff introduced in evidence plaintiff's exhibits 7 and 8 which represent sales to a Canadian purchaser and a Mexican purchaser. The sales, according to witness Bryan, were made by him in the United States but were shipped to the respective purchasers from Hong Kong although the Canadian sale appears to have been sent to the United States and transferred to Canada. In any event, during the time period involved herein, only a few of the nine styles before the court were sold to third countries.

Defendant contends, based upon the decision in *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F.2d 1400 (1974), that only sales to the United States are to be considered when determining "market value," under section 402(f)(1)(B). Hence sales to Canada or Mexico involve an irrelevant market. The court in *Wood* (p. 32) made the following comment:

> Also, it was pointed out in the hearings, that the definition of "freely sold or offered for sale" in subsection 402(f)(1) would permit use of sales to exclusive agents.[10] Although the term "market value" in subdivision 402(f)(1)(B) was not defined in the Act, it obviously must relate to the relevant market. In the case of export value, this would be the export market in the exporting country to the United States and *not the foreign domestic market*, since use of the latter would result in a determination of foreign value which was deleted by the Act.[11]
>
> From the foregoing, we conclude that Congress clearly intended that export value be determined by considering only the exporting country's market for exportation to the United States [12] and that sales at wholesale to exclusive or selected agents be used in determining export value if the prices fairly reflect the market value.[13] *United States* v. *Acme Steel Co.*, 51 CCPA 81, C.A.D. 841 (1964) is hereby overruled to the extent that it

approved consideration of sales in the domestic market of the exporting country in the determination of export value. * * *

[10] *House Hearings* 29; *1955 Senate Hearings* 18.
[11] *House Hearings* 120; *1955 Senate Hearings* 148.
[12] There was a proposal that export value be determined upon exports to all countries, not just the United States, but this was rejected. *House Hearings* 57; *1955 Senate Hearings* 62, 64–65.
[13] Subdivision 402(f)(1)(B) requires that the price to one or more selected purchasers be one which "fairly reflects the market value," not that the price reflect a *fair* market value. The prices to the selected purchasers are, therefore, to be measured against the market value and not some other standard such as costs of production.

Accordingly, I am constrained to hold, based upon the record, that export value as contended by plaintiff does not exist under the law based upon the restrictions for determining whether a "price fairly reflects the market value," in the *Wood* and *Baldwin* decisions. While the appraisement was not made in accordance with the statutory provisions, plaintiff has failed to establish a correct dutiable value. The value found by Customs must, therefore, stand.

Judgment will be entered accordingly.

(C.D. 4753)

HUGO STINNES STEEL AND METALS CO. *v.* UNITED STATES

Opinion and Order on Cross-Motions for Summary Judgment

I. CUSTOMS COURT; SCOPE OF REVIEW—In actions seeking a determination of the proper rate or amount of duty on imported merchandise, the Customs Court is not limited to a review of the administrative record, but rather, the entire record made before the court must be considered in determining whether the decision of the customs service is correct.

II. CUSTOMS DUTIES—Presidential Proclamation 4074, imposing a 10% surcharge on all imported articles, and Additional Duty Order No. 3, which granted a limited exemption there from for "articles exported to the United States" before the Proclamation's effective date, involved the exercise of powers not inherent in the Executive Branch of the Federal Government, but powers exercised pursuant to authority initially delegated by Congress.

III. CUSTOMS DUTIES—The term "exported to the United States" found in headnote 5(h), subpart C, part 2, TSUS Appendix, incorporates two essential elements: first, the severance of merchandise from the mass of goods of a foreign country, and second, at the time the merchandise is so severed, the existence of a demonstrable intention on the part of the American

importer to next unite the merchandise to the mass of goods of the United States, and to that of no other country.

IV. CUSTOMS DUTIES—The existence of a substantial possibility or contingency of diversion bears upon and is closely related to the proof of the importer's *bona fide* intention to transship the merchandise to the United States.

V. CUSTOMS DUTIES—In order to constitute a contingency of diversion sufficient to bear upon the importer's intention to transship, the possibility of diversion must have a realistic basis in fact and not be mere conjecture.

Court No. 73-2-00485

Port of Toledo (Cleveland)

[Judgment for plaintiff.]

(Decided June 20, 1978)

Rode & Qualey (*Ellsworth F. Qualey* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

BOE, Judge: The plaintiff has filed a motion for summary judgment contesting the imposition of a supplemental duty in the amount of 10% ad valorem under item 948.00, Tariff Schedules of the United States, pursuant to Presidential Proclamation 4074, 36 F.R. 15724 (1971). The merchandise upon which the supplemental duty was assessed consisted of 415 coils of cold rolled steel sheets, shipped from Japan on July 17, 1971 to Antwerp, Belgium, shipped therefrom to the United States on September 25, 1971 and entered at the port of Toledo, Ohio on or about November 4, 1971. A protest to the assessment was filed by the plaintiff which was denied by the customs service.

The defendant has filed a cross-motion for summary judgment contending that the Commissioner of Customs properly determined that the date of exportation of the merchandise in question to the United States was the date on which the steel coils were shipped from Belgium on September 25, 1971 and, accordingly, were subject to the 10% supplemental duty provided by Presidential Proclamation 4074 and the orders, rules and regulations subsequently issued by the Secretary of the Treasury by way of implementation.

By the terms of Presidential Proclamation 4074, the supplemental duty in the amount of 10% was imposed on all dutiable articles, except those articles exempted by the Secretary of the Treasury, imported for consumption into the customs territory of the United States after 12:01 a.m., August 16, 1971. To implement the provision

providing for the imposition of the supplemental duty, the Proclamation directed that subpart C be inserted immediately after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States. By the terms of headnote 4(a), subpart C, authority was delegated to the Secretary of the Treasury to "* * * take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish exemption therefrom * * *."

In the course of the administration of the provisions relating to the supplemental duty, it appeared that in certain circumstances equity justified a one-time, non-recurring exemption from the effective time and date of the supplemental duty as fixed by the Presidential Proclamation. Accordingly, on August 31, 1971, the Secretary of the Treasury issued Additional Duty Order No. 3, 36 F.R. 17667 (1971), providing the following exemption from the imposition of the supplemental duty:

> *Headnote 5, subpart C, part 2, Appendix to the Tariff Schedules of the United States:*
>
> 5. *Articles exempt from the additional duties.*—In accordance with determinations made by the Secretary in accordance with Headnote 4(a), the following described articles are exempt from the provisions of this subpart:
>
> * * * * * * *
>
> (h) Articles exported to the United States before 12:01 a.m., August 16, 1971, * * *.

The issue presented to the court in this action, accordingly, is whether the merchandise in question, entered into the United States at Toledo, Ohio on November 4, 1971 was "exported to the United States before 12:01 a.m., August 16, 1971" within the intendment of Additional Duty Order No. 3 promulgated by the Secretary of the Treasury.

In the determination of the foregoing issue, the defendant contends that this court is restricted only to a review of the administrative record to determine whether the decision of the Commissioner of Customs was reasonable. This position of the government is predicated upon Additional Duty Order No. 3 which, the defendant maintains, conferred upon the Commissioner of Customs the discretionary authority to determine what goods, in fact, were "exported to the United States before 12:01 a.m., August 16, 1971." Additional Duty Order No. 3 provided in pertinent part:

> By virtue of the authority vested in the Secretary of the Treasury, * * * the Commissioner of Customs, with the approval of the Assistant Secretary of the Treasury (Enforcement, Tariff and Trade Affairs, and Operations) is authorized to prescribe such regulations and issue such instructions as may be necessary to carry out the purposes of this order.

I

Recently, the government has been urging with increased frequency that decisions made by the Secretary of the Treasury and the Commissioner of Customs of the character presently under consideration may be reviewed only with respect to the reasonableness thereof. From whence such a construction has had its origin is not suggested or explained. No applicable authority for this position has been cited by the defendant.[1] Nor has this court independently been able to discover any authoritative support therefor. On the contrary, the defendant's construction as to the extent of this court's scope of review in a proceeding of this character is neither consistent with existing statute relating to trial procedure in this court, nor with the historical and accepted practice, particularly in proceedings seeking a determination as to the applicability of a rate of duty upon imported merchandise. The intent of Congress, indeed, is clear as to the extensive character of the judicial review it assures a litigant in any proceeding before the United States Customs Court. 28 U.S.C. § 2637(a) provides:

> In *any* proceeding in the Customs Court, under rules prescribed by the court, the parties and their attorneys *shall* have an opportunity to introduce evidence, to hear and cross-examine the witnesses of the other party, and to inspect all samples and all papers admitted or offered as evidence, * * *. [Emphasis added.]

However, the defendant urges that the instant action should be considered outside the usual framework of cases presented to this court because the administrative decision denying plaintiff's protest was based upon an interpretation of an intra-executive department directive—Additional Duty Order No. 3. To so characterize the Order of the Secretary of the Treasury is a gross misconception. Presidential Proclamation 4074 and Additional Duty Order No. 3 became a part of the Tariff Schedules of the United States. Each with respect to the supplemental duty and its application was the legal equivalent of a Congressional enactment. The 10% supplemental duty was not restricted to specific or a limited number of tariff provisions, but applied generally on all dutiable articles imported into the United States except those which the Secretary of the Treasury was authorized to exempt. The powers exercised by the President and the Secretary of the Treasury were not inherent in and to the Executive Branch of

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[1] The defendant's purported reliance upon *Suwannee Steamship Co.* v. *United States*, 79 Cust. Ct. 19, C.D. 4706, 435 F. Supp. 389 (1977), is clearly misplaced. The decision did not involve the rate or amount of duty owed on imported merchandise. Indeed, the *Suwannee* case did not involve any importation into the United States, but rather related to a question of repairs made upon an American vessel in a foreign port. The former decision of this court can in no manner offer persuasive support of the contention of the defendant herein.

government, but rather were exercised by and through the authority initially delegated by the Congress. *See United States* v. *Yoshida International, Inc.*, 63 CCPA 15, C.A.D. 1160 526 F. 2d 560 (1975).

In the same manner as any importer seeks an adjudication of the proper rate of duty assessed by the customs service on specific merchandise imported into the United States by the filing of a protest and upon denial thereof by a trial on the record before the Customs Court, so the plaintiff in the instant proceeding, upon the denial of its protest, seeks an adjudication in a trial on the record with respect to its liability for the "additional duty" imposed by Presidential Proclamation 4074 on the specific merchandise imported.

II

In determining, therefore, whether the merchandise in question had been "exported to the United States" before the date and time specified in Presidential Proclamation 4074 and within the intendment of the exemption provided in Additional Duty Order No. 3, it is proper to not only consider the record examined by the Commissioner of Customs in making his determination in the within proceedings, but also the evidence submitted by way of depositions together with the various exhibits presented to this court in connection with this proceeding.[2]

In February 1971, Heine Bros., Ltd., an English trader in steel, offered to sell to La Metallurgie Liegeoise, a Belgian steel trader, a quantity of cold rolled steel sheets in coil. Heine Bros., in turn, had been offered the steel from Koyo Boeki Co., Ltd., a Japanese steel trader, which steel was to be manufactured in Japan by Nippon Steel Corp. La Metallurgie Liegeoise was given a period of time to accept the offer to purchase the steel from Heine Bros. In the course of attempting to secure buyers for the steel which it had the option to purchase, La Metallurgie Liegeoise on February 24, 1971 offered to sell to the plaintiff 2,000 metric tons (m/t) of cold rolled steel sheets in coils. On May 5, 1971, presumably after negotiations with respect to the total amount of the purchase had been completed, the plaintiff sent its order to La Metallurgie for 11,000 m/t of the steel coils.

The plaintiff's order specified "Nippon Steel Corp., Japan" as the origin of the steel. The total order was subdivided into six different order numbers—10555, 10556, 10557, 10558, 10559 and 10562. Each

[2] In support of its motion for summary judgment, the plaintiff offered the depositions of four witnesses: Camille Brasseur, the president of La Metallurgie Liegeoise, the Belgian steel trading firm which sold the steel involved herein to the plaintiff; Roger Roggeman, the export manager of Neptune, S.A., the international freight forwarder which handled the steel while it remained in Antwerp; and Lothar Gue and Eva Houlihan, respectively the sales manager and assistant sales manager of the plaintiff in 1971, the year of the subject importations.

order number related to the destination in the United States to which the respective designated quantities of steel were to be delivered. The merchandise in question in this proceeding relates, however, only to order numbers 10555 and 10556. The price for the merchandise was specified in United States dollars per m/t and insurance at 115% of the sales price in United States dollars was stipulated. The terms of the sale were "CIF free out Antwerp." [3] The order specified that the goods be exported from Japan prior to July 31, 1971. The order also required that the merchandise be marked for transshipment to designated ports in the United States in accordance with a schedule which was attached to the order consisting of a separate and individual page for each of the six different order numbers. The respective pages dealing with order numbers 10555 and 10556, the merchandise in question, indicated at the top of the page that the quantity of steel specified therein was intended for transshipment to Toledo, Ohio. Each coil of steel included in the respective order numbers was to be marked by means of two metal tags. Each tag was to indicate the order number, 10555 or 10556, the specification and also the designation Antwerp/Alpha. Other distinctive designations such as "Antwerp/Beta" and "Antwerp/Gamma" were specified on each tag for merchandise destined to other United States ports. The steel coils, a total of 148, included in order number 10555, were to be further identified by means of two red color strokes on each tag; the steel coils, a total of 267, included in order number 10556, were to be further identified by means of two yellow color strokes on each tag.

Plaintiff's agreement with La Metallurgie called for payment by means of an irrevocable letter of credit. In accordance therewith, an irrevocable and transferable letter of credit was opened on plaintiff's account by the Bank of America in New York on June 10, 1971, for the benefit of La Metallurgie Liegeoise. This letter of credit was amended on June 18, 1971. The tenor of the credit provided for the honoring of La Metallurgie's time drafts 60 days after the date of the bills of lading on Banque de Bruxelles in Liege, Belgium. Further terms of the letter of credit required that the steel be shipped from Japan CIF free out Antwerp; that shipment from Japan occur by July 31, 1971; and that the insurance policy or certificate cover all risks including war and strikes, riots, and civil commotions in an amount equal to 115% of the sales value of the merchandise payable in U.S. dollars.

While negotiating with La Metallurgie Liegeoise for the purchase of the steel, the plaintiff was securing purchasers for the same steel

[3] By said terms, the seller was required to pay the charges for insurance and freight with respect to the merchandise to the point of destination, Antwerp. Charges for unlading the merchandise from the charter vessel were to be borne by the purchaser.

in the United States. One of these U.S. buyers was Barsteel, a division of U.S. Industries. On May 13, 1971, the plaintiff confirmed Barsteel's order for approximately 5,000 m/t of the steel coils divided under sales contract numbers 10555 (1,750 m/t) and 10556 (3,000 m/t). The confirmation evidences that the steel so purchased by Barsteel was similar in both description and amount with that involved in the identical order numbers—10555 and 10556—of plaintiff's contract with La Metallurgie. The written agreement with Barsteel did not specify Japan as the country of origin of the steel. The deposition of Eva Houlihan, however, indicates that Barsteel was informed that it was purchasing Japanese steel.

All shipping arrangements for the merchandise in question from Japan to Antwerp were made by Koyo Boeki, the Japanese trader and steel exporter. Shipment from Japan to Antwerp was provided by charter vessel. Prior to the time of shipment from Japan on July 17, 1971, the steel was marked in accordance with the instructions contained in the schedule attached to plaintiff's original purchase order with La Metallurgie. The bills of lading for the shipment from Japan to Antwerp required notification with respect to shipment to be given to Neptune, an international freight forwarder in Antwerp. These documents contained the order numbers designating the specific merchandise in question, 10555 and 10556, and also the required designation "Antwerp/Alpha" together with two red color strokes on each tag contained in order number 10555, and two yellow color strokes on each tag contained in order number 10556. From the testimony adduced in the depositions, it appears that because the shipment of the merchandise in question was made by charter vessel, the bills of lading did not indicate thereon that the merchandise was to be transshipped to a destination other than Antwerp.

In the early part of July and prior to the time of the shipment of the merchandise in question from Japan, the plaintiff had made formal arrangements with Neptune to care for the merchandise as it was unladen at the pier in Antwerp, and to supervise the loading of the merchandise upon the carrier transporting the merchandise from Antwerp to the United States.

Likewise, in early July of 1971 the plaintiff entered into negotiations with Cast Steamship Company to ship the merchandise in question from Antwerp to Toledo, Ohio. It appears that a formal agreement between Cast Steamship Company and plaintiff was reached on July 26 and July 28, 1971, and by August 9, 1971 all information had been supplied to Cast Steamship Company requisite to the shipment of the merchandise in question from Antwerp to the United States. The bills of lading which were made out on that date corresponded with the information appearing on the bills of

lading of the charter vessel transporting the merchandise from Japan to Antwerp. Direct reference was made on each bill of lading of Cast Steamship line to the corresponding bill of lading issued by the Japanese charter vessel.

The merchandise in question was shipped from Japan, as aforereferred to, on July 17, 1971 and arrived in Antwerp on or about September 4, 1971 where the merchandise was unladen and stored on a covered pier in the Antwerp harbor. At plaintiff's prior instruction necessary documentation was supplied by Neptune to Belgian customs officials in order to place the merchandise in question in an "in-transit" status while in Antwerp. No Belgian customs duties were paid on the merchandise. The merchandise did not leave the pier in Antwerp harbor from the time it was unladen from the charter vessel until it was again laden for transshipment to the United States. Upon arrival of the merchandise in question at Antwerp, it bore the required markings indicating the respective order numbers 10555 and 10556, the specifications, the designation "Antwerp/Alpha" and the respective red and yellow color strokes. A small portion of the merchandise arrived in a damaged condition. The plaintiff was reimbursed for this damage by the insurance required by both its contract with La Metallurgie and by the letter of credit issued by the Bank of America. A portion of the shipment was repacked and, while on the pier in Antwerp, was marked with the additional designation "Toledo/Japan." The merchandise in question, laden aboard the vessel of the Cast Steamship line, departed Antwerp for the United States on or about September 25, 1971, arrived at Toledo, Ohio, on or about October 10, 1971 and was entered on November 4, 1971.

III

In the consideration of the issue raised by the cross-motions herein, it is recognized that the determination of the Commissioner of Customs bears a strong presumption of correctness. *See* 28 U.S.C. § 2635(a). This presumption attaches to each fact essential to his decision. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *Novelty Import Co., Inc.* v. *United States*, 53 CCPA 28, C.A.D. 872 (1966). Upon the plaintiff falls the burden of demonstrating by substantial evidence that this determination is incorrect.

In considering the denial of the plaintiff's protest to the imposition of the supplemental duty by the customs service, it is necessary and proper that we examine the basis upon which such a determination was made. In a letter directed to plaintiff's counsel under date of March 7, 1972, responding to counsel's contention that the decision of the District Director of Customs denying the exemption was

erroneous,[4] the Commissioner set forth the standard of proof required to include the merchandise in question within the duty exemption provided in Additional Duty Order No. 3. This letter states in pertinent part:

> Your letter cites various cases in which the courts have held that merchandise produced in Country A but shipped to the United States by way of Country B was, for valuation purposes, the product of Country A. However, in this case the country of exportation for valuation purposes is not in issue but, rather, the question is one of establishing the fact of a legal obligation to transship the merchandise in question to the United States at the time it left Japan for purposes of applying the surcharge. * * *
>
> In the absence of proof that the merchandise was under an absolute legal obligation to be transshipped to the United States, and could not, under any circumstances, have entered the stream of commerce in Belgium or have been transshipped to a country other than the United States, we must affirm our prior conclusion that, for purposes of the surcharge, the date of exportation to the United States was the date on which the goods were shipped from Belgium.

In support of the Commissioner of Customs' determination and the standard used by him in reaching the same, the defendant contends that in order for the merchandise in question to be exempt from the supplemental duty within the intendment of Additional Duty Order No. 3, the evidence and proof must be sufficient to establish:

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[4] Plaintiff's counsel argued that the proper standard to determine entitlement to the exemption was the country of exportation criteria used for determining appraised value under 19 C.F.R. § 14.3(d)(1971), which provided that:

> Merchandise imported from one country, being the growth, production, or manufacture of another country, shall be appraised at its value in the principal markets of the country from which it is immediately imported unless it appears by the invoice, bill of lading, or other evidence that the merchandise was destined for the United States at the time of original shipment, in which case it shall be appraised at its value in the principal markets of the country from which it was originally exported.

See also United States v. *F.W. Hagemann*, 39 CCPA 182, C.A.D. 484 (1952); *W.R. Zanes & Co. et al.* v. *United States*, 40 Cust. Ct. 678, R.D. 9062 (1958).

Plaintiff's contention was based upon instructions issued in a telegram, dated September 3, 1971, from the Commissioner of Customs to all Regional Commissioners and District Directors of Customs regarding the method by which the date of exportation was to be determined. The telegram reads in pertinent part:

> For the purpose of determining the date of exportation under the provisions of Headnote 5(h) subpart C of part 2 of the Appendix to TSUS, the rules set forth below shall be followed:
>
> Where goods are exported from the country of exportation by vessel, and where the vessel lades merchandise at 2 or more ports within that country, the date of exportation for each of the shipments shall be the date upon which the shipment left the port at which it was laden. However, where a vessel lades merchandise and departs from the country of exportation, touches at one or more ports in another foreign country or countries, returns to a port in the country of exportation and then proceeds to the United States, directly or via other foreign countries, the date of exportation for all merchandise laden abroad the vessel in the country of exportation shall be the date upon which the vessel last departed that country enroute to the United States.
>
> "Country of Exportation" shall be determined in the manner used to determine the country wherein value in its principal markets is used in appraisement under the provisions of section 14.3(d), Customs Regulations [19 C.F.R. § 14.3(d) (1971).]
>
> • • • • • • •

Plaintiff continues to rely upon this argument in its submission before this court. The defendant strenuously contends that the instructions contained in the September 3, 1971 telegram are not applicable in this case. In light of the determination the court makes herein, *see infra*, it is unnecessary to resolve this dispute.

(a) at the time of the shipment from Japan on July 17, 1971, the steel coils were destined for the United States.
(b) that no possibility or contingency of their diversion elsewhere existed.[5]

The court can neither view the evidence in the light and manner urged by the defendant nor accept the construction placed upon Additional Duty Order No. 3 by it and the Commissioner of Customs. In other contexts, the meaning of the term "export" or "exportation" has been considered by this court as well as our appellate court. In *United States* v. *The Natural Sugar Refining Co.*, 39 CCPA 96, C.A.D. 470 (1951), the appellate court in dealing with the allowance of a drawback stated (at 101):

> An exportation is a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country.

See also Swan & Finch Co. v. *United States*, 190 U.S. 143 (1903); *Avakian Bros., Inc.* v. *United States*, 41 CCPA 80, C.A.D. 532 (1953); *Nassau Distributing Co., Inc.* v. *United States*, 29 Cust. Ct. 151, C.D. 1459 (1952). Thus, in construing the meaning of the term "exported," two factors are of paramount importance: *first*, the act of shipment or severance from the country of origin, and *second*, the intention to unite the articles to a mass of goods of another country.

The conditional language of exemption used by the Secretary of the Treasury in Additional Duty Order No. 3—"exported to the United States before 12:01 a.m., August 16, 1971"—falls within this well-recognized definition. Accordingly, in the instant proceeding the merchandise in question must have been severed from the mass of goods of a foreign country (Japan) prior to the effective date of Presidential Proclamation 4074. At this point in time, the plaintiff, as the American importer, must have had the objective and demonstrable intention to next unit this merchandise to the mass of goods of the United States.

The evidence adduced on these cross-motions overwhelmingly indicates that at the time the steel coils were shipped from Japan on July 17, 1971, and, indeed, long prior thereto, the plaintiff intended that they be joined to the mass of goods of the United States and to that of no other country. The agreement between plaintiff and La Metallurgie Liegeoise for the purchase of the Japanese steel entered into on May 5, 1971, and confirmed by the Belgian firm on June 2,

[5] At the time of oral argument, defendant's counsel indicated that the reference by the Commissioner in his letter to "* * * an absolute legal obligation to be transshipped to the United States * * *" was not meant as a legal standard but as an alternative to and a method of answering plaintiff's contention that the "country of exportation" should be applied in determining the entitlement to an exemption. Counsel indicated that the applicable standard was whether a contingency of diversion existed at the time the instant merchandise left Japan.

1971, expressly specified that the merchandise in question was to be transshipped through Antwerp, Belgium, to a designated port in the United States, Toledo, Ohio. The plaintiff specified in its purchase order that each coil involved therein was to be marked with a specific order number (10555 or 10556), the designation "Antwerp/Alpha" and two color strokes. The foregoing identification was designated to facilitate its transshipment to the United States. The purchase agreement required that the merchandise in question be shipped from Japan no later than July 31, 1971. The provision in the sales agreement that shipment was to be made "CIF free out Antwerp," required La Metallurgie Liegeoise to cover both the freight and the insurance on the shipment of the steel from Japan to Antwerp *for the benefit of the plaintiff*.

The sale contract between the plaintiff and Barsteel under date of May 13, 1971, whereby the plaintiff agreed to sell the rolled steel coils to Barsteel, offers further persuasive support of plaintiff's intention at the time the merchandise was exported from Japan on July 17, 1971. It is true this contract did not specifically identify the steel to be the same steel as purchased by the plaintiff from La Metallurgie Liegeoise. Nor was the country of Japan specified as the country of origin. However, the order numbers specified in the Barsteel sale agreement, 10555 and 10556, were identical with the order numbers contained in plaintiff's purchase contract with La Metallurgie Liegeoise. The specifications and amounts of the steel under each order number were substantially the same. The testimony contained in the depositions of Lothar Gue and Eva Houlihan clearly indicates without contradiction that the steel coils which the plaintiff was selling to Barsteel were the identical steel coils which plaintiff was purchasing contemporaneously from La Metallurgie Liegeoise for shipment from Japan to Antwerp for transshipment to Toledo, Ohio.

The evidence relating to the shipment of the merchandise in question, and particularly with respect to the unlading thereof in Antwerp and the subsequent transshipment to the United States, provides further corroboration that the plaintiff never deviated in its intention to transship the goods to the United States. Prior to the shipment of the merchandise in question, the Japanese exporter was instructed that "Neptune-Antwerp" be notified upon the shipment of the steel coils from Japan. During the first week in July 1971, and prior to the exportation of the merchandise in question from Japan, the plaintiff negotiated with Neptune with respect to the care and handling of the merchandise upon its arrival in Antwerp, and particularly with respect to the procurement of an "in-transit" certificate from Belgian customs so as to avoid the assessment of Belgian customs duties. During this

same period of time, the plaintiff was also engaged in negotiation with the Cast Steamship Co. for the transshipment of the merchandise in question from Antwerp to Toledo, Ohio. These negotiations were completed by the end of July 1971, and by August 9, 1971, the Cast Steamship Co. advised that it had all the information needed to complete its various bills of lading for shipment to Toledo, Ohio. These bills of lading again corresponded directly with those covering the initial shipment of the merchandise in question from Japan to Antwerp, and expressly indicated that the steel which was to be shipped to Toledo was the identical steel as that arriving from Japan on the charter vessel S.S. MESNA identified by order numbers 10555 and 10556, and bearing the designation "Antwerp/Alpha" and the required color strokes. No evidence is contained in the entire record that from the time of its arrival in Antwerp, Belgium that its status was other than "in-transit" until it was laden on the vessel of the Cast Steamship Co., S.S. RAGNHILD, on September 25, 1971. The merchandise remained on the same pier in the port of Antwerp and was covered by an "in-transit" certificate which Neptune as the forwarding agent had procured at plaintiff's direction. No Belgian customs duties were assessed or paid.

From a review of the entire record in this proceeding, the court is unable to discern any evidence indicating that at the time the merchandise in question was shipped from Japan on July 17, 1971, the plaintiff had any intention *other* than to transship the same to the United States upon its arrival in Antwerp. On the contrary, the evidence indicates without contradiction that at the time the merchandise was shipped from Japan, the intention of the plaintiff, in fact, had ripened into an executory contract to transship the merchandise in question from Antwerp to the United States, and deliver the same to Barsteel at Toledo, Ohio.

IV

The defendant, however, maintains that notwithstanding the sale agreement with respect to the merchandise in question entered into between the plaintiff and Barsteel prior to the date of its shipment from Japan, a significant contingency existed that the merchandise might be diverted elsewhere than the intended port of Toledo, Ohio. Such a contingency of diversion, the defendant urges, would preclude the plaintiff from claiming an exemption from the supplemental duty as provided by Additional Duty Order No. 3.

As evidence of this contingency, the defendant points to the following facts adduced from the record: (1) the bills of lading upon the merchandise covering the shipment of the steel by charter vessel from Japan to Antwerp did not list the United States as the ultimate

destination; (2) the plaintiff inspected the merchandise on the pier in Antwerp and caused some damaged coils to be repacked; (3) the plaintiff paid for the steel purchased from La Metallurgie Liegeoise after receiving it in Antwerp.

In the presentation of this contention, the defendant appears to consider a contingency of diversion to be an element of proof separate and distinct from the question of plaintiff's intention to transship the merchandise in question to the United States, and, accordingly, to be an independent, affirmative legal requirement under Additional Duty Order No. 3. It is the opinion of this court that the proof of intent of the plaintiff as an importer and the contingency of a diversion of the merchandise in question are closely related but not separate and individual elements of proof. The presence in the record of evidentiary facts constituting such a contingency of diversion, as would tend to negate the existence of a continuing intention to transship the merchandise in question on the part of the plaintiff, is a matter which concerns the weight and the sufficiency of all of the evidence presented.

Again, from a close examination of all of the evidence, it appears that the facts which have been specifically advanced by the defendant as constituting a contingency of diversion do not serve to negate the full and continuing intention of the plaintiff to transship the steel coils to the United States from the time that they were exported from Japan.

From the exhibits comprising the record in this case, it is clear that the bills of lading covering the merchandise in question as it was shipped by a charter vessel from Japan to Antwerp did not indicate the United States to be the ultimate destination. The designations contained thereon were the notations "port of discharge"—"Antwerp." After the notation "destination: (if goods to be transshipped at port of discharge)," the space provided was blank. The defendant urges that the latter omission indicates that the merchandise was not destined for the United States when it left Japan.

While the entries on commercial documents such as invoices and bills of lading are often the most persuasive evidence of the intention of the parties, they are not conclusive with respect thereto. This court in other proceedings has received extrinsic evidence which might more accurately reflect the nature of the transaction involved. *See T. M. Duche & Sons, Inc., et al.* v. *United States*, 49 Cust. Ct. 377 R.D. 10325 (1962); *W. R. Zanes & Co. et al.* v. *United States, supra; United States* v. *Meadows, Wye & Co. (Inc.)*, 49 Treas. Dec. 959, T.D. 41622 (Cust. Ct. 1926).

In the instant proceeding, it appears that the bills of lading covering the shipment from Japan to Belgium were prepared in accordance

with the information given by Heine Bros. to Koyo Boeki, the Japanese steel trading company, which company, in turn, transmitted such information to the Japanese charter vessel. It is acknowledged that neither Koyo Boeki nor the owners of the charter vessel were aware that the steel was to be transshipped to the United States from Antwerp. However, it, again appears that the evidence serves to satisfactorily explain the reason for the absence of the designation of the ultimate destination of the merchandise in question on the Japanese bills of lading. The initial purchase agreement between the plaintiff and La Metallurgie Liegeoise called for neutral markings on each steel coil. Neither the name of La Metallurgie nor the plaintiff was to be on the steel itself. It was explained in the deposition of Camille Brasseur, president of La Metallurgie Liegeoise, that such a provision was a matter of "commercial discretion" and that the procedure of not disclosing the identity of its purchasers to its suppliers or others was in the interest of the Belgian firm. It, accordingly, would have been impossible for the Japanese trading company or the shipper to have included the place of ultimate destination in view of their lack of knowledge of the identity of the parties who successively had purchased the merchandise in question from Heine Bros. of London, England.

The manner of the shipment of the steel from Japan to Antwerp lends a further explanation to the absence of a specific transshipment destination on the bills of lading. The Japanese steel trader, Koyo Boeki, initially offered the steel to Heine Bros. on the basis of its shipment to Antwerp by a charter vessel. It appears that such a mode of shipment was designated for the reason that any cargo in excess of 2,000 metric tons (m/t) could be shipped in this manner at a lower freight charge than by ordinary ocean freighter (*see* Defendant's Exhibit F). Accordingly, the vessel was chartered by the Japanese seller solely for the voyage from Japan to Antwerp. Heine Bros. transmitted the foregoing terms relating to shipment to La Metallurgie Liegeoise, which company, in turn, transmitted the same terms to the plaintiff. In view of the fact that the shipment of the steel in question from Japan to Antwerp was governed by a charter contract, which extended no farther than the Belgian city, it would have been anomalous to have required or expected the ultimate transshipment destination to have been included on the bills of lading.

While the absence of a specific intention on the part of the Japanese trading company, Koyo Boeki, to transship the steel to the United States might have been significant in other contexts, *see United States, v. Hospitaline, Inc.*, 50 Cust. Ct. 556, 563–64, A.R.D. 156 (1963), (Donlon, J. concurring), in the present proceeding, it is the intention of the plaintiff alone which is controlling. The exemption from the

supplemental duty provided for by Additional Duty Order No. 3 addresses itself solely to the American importer (plaintiff) by relieving the importer from the payment of the duty with respect to merchandise "exported to the United States before 12:01 a.m., August 16, 1971." As previously referred to herein, the evidence appears abundant to the court that the plaintiff intended the merchandise in question to be transshipped from Antwerp to the United States at the time it was exported from Japan. The Japanese bills of lading and the absence of the designation of the ultimate destination of merchandise in question thereon, when viewed in the light of all of the evidence adduced in this proceeding, cannot be said to indicate such a contingency of diversion as to negate the intention of the plaintiff to transship the steel coils from Antwerp to the United States.

The defendant submits that a second contingency of diversion existed by virtue of the inspection of the steel by the plaintiff and its representatives while it remained on the pier in Antwerp after its arrival from Japan. More precisely, the Government argues that the mere right of the plaintiff to inspect the steel in Antwerp amounted to a substantial possibility that it would be diverted from its intended destination to the United States. The evidence, however, would indicate this contention likewise to be without merit.

The plaintiff inspected the steel in Antwerp for two distinct purposes. The first purpose was to ascertain that the merchandise which arrived in Antwerp was that which it had contracted to purchase from La Metallurgie Liegeoise, and that the steel was marked and identified in accordance with the contract specifications. No evidence appears in this case that the steel failed to conform to the agreed specifications or that the required designated markings had been omitted. It, indeed, would be unusual and contrary to commercial practice to construe the right of inspection in order to insure contract conformity to constitute such a contingency of diversion as would negate the plaintiff's intention to transship the same to the United States. Where, as indicated by the record, the specifications and the markings thereon conformed to its agreement with La Metallurgie, the plaintiff had no legal right to refuse the acceptance of the merchandise.

The second purpose for the inspection of the merchandise was to determine whether any damage had resulted thereto. The defendant in referring to the evidence indicating that certain minor damage had occurred to some of the merchandise in question has stated that the plaintiff, being dissatisfied, contemplated a rejection of the steel for this reason. A review of the record does not disclose evidence of this character and does not confirm such a conjectural and inaccurate conclusion. Although it is undisputed that the steel coils sustained

some damage when they arrived in Antwerp, the plaintiff had no legal right to reject them for this reason. Plaintiff and La Metallurgie in their purchase and sale agreement had embodied the provisions therein of a CIF contract, under which the purchaser (plaintiff) bore the risk of loss or damage from the time of the lading on board the charter vessel at the port of shipment in Japan. *Cerro de Pasco Copper Corp.* v. *Knut Knutsen O.A.S.*, 94 F. Supp. 60 (S.D.N.Y. 1950), *aff'd* 187 F. 2d 990 (2d Cir. 1951); *see generally Williston on Sales* § 280(c) (rev. ed. 1948); T. Bugan, *When Does Title Pass*, ch. XXI (2d ed. 1951); Llewellyn, *CIF Contracts in American Law*, I, 32 Yale L.J. 711 (1923). The reason for the risk of loss or damage falling upon the purchaser (plaintiff) is predicated upon the fact that an essential element of a CIF contract is the requirement that the seller provide a policy of insurance to the point of destination *for the benefit* of the purchaser. Thus, the plaintiff was protected not by a right of rescission or rejection in case the merchandise was damaged in whole or in part upon its arrival in Antwerp, but by the right of recovery upon the policy of insurance thereon.

Accordingly, when the plaintiff inspected the merchandise on the pier in Antwerp, a claim was made upon the negotiable policy of insurance which had protected the plaintiff's interest in the steel on the voyage from Japan to Belgium. The evidence indicates a settlement was negotiated which covered the damage and the cost of repacking a small number of the steel coils. Had the plaintiff not inspected the steel in Antwerp, it would have forfeited any opportunity for a recovery based upon the policy insuring the shipment from Japan to Antwerp. *See* Plaintiff's Exhibit 11. The court, accordingly, finds nothing in the inspection of the steel and the resulting insurance settlement which in any way negates plaintiff's intention to transship the merchandise to the United States.

The third contingency of diversion submitted by the defendant is contained in defendant's assertion that the plaintiff paid for the steel after its arrival and inspection on the pier in Antwerp. Again, an examination of the record and a consideration of the manner and form of the payment fail to support such an assertion.

The plaintiff pursuant to the terms of its agreement with La Metallurgie Liegeoise paid for the steel by procuring an irrevocable and transferable letter of credit by the Bank of America for the benefit of La Metallurgie. This letter of credit was issued on June 10, 1971, and amended with the consent of all parties concerned on June 18, 1971. The tenor thereof provided for payment of time drafts 60 days after the date of the Japanese bills of lading, although presentation, acceptance and discounting of the drafts could be made at any time upon the presentation of the required documents. The

Bank of America expressly agreed to honor all drafts drawn thereon and negotiated on or before October 15, 1971. It appears that the defendant in its contention concerning payment fails to recognize the import of a letter of credit and its legal effect in connection with the law of Sales. Article 3 of the Uniform Customs and Practice for Documentary Credits (1962 revision), International Chamber of Commerce Brochure No. 222, expressly made applicable herein by the terms of the letter of credit, defines the concept of irrevocability as follows:

> An irrevocable credit is a definite undertaking *on the part of an issuing bank* and constitutes the engagement of that bank *to the beneficiary* or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.
>
> * * * * * * *
>
> Such undertakings can neither be modified nor cancelled without the agreement of all concerned. [Emphasis added.]

Thus, the letter of credit procured by the plaintiff formed a contractual relationship between the Bank of America and the beneficiary, La Metallurgie. When the beneficiary presented the required documents to the issuing or confirming bank, a fact which appears undisputed in this proceeding, it became entitled to the payment of its drafts drawn in accordance with the terms of the letter of credit.[6] *See*, e.g., L. Honnold, *Law of Sales and Sales Financing*, ch. 5, § 5 (1976); Mead, *Documentary Letters of Credit*, 22 Colum. L. Rev. 297, 302–03 (1922). Once the irrevocable letter of credit had been procured from the Bank of America, the plaintiff was impotent to unilaterally modify or cancel it. The mere fact that the credit's tenor—"60 days after date of bill of lading on Banque de Bruxelles, Liege, Belgium"—called for time rather than sight drafts by La Metallurgie Liegeoise does not alter the essential fact that upon presentation of the required documents, the Belgian firm had an absolute legal entitlement to the acceptance of its drafts. Accordingly, by customary commercial practice the plaintiff, contrary to the contention of the defendant, paid for the steel involved in these proceedings at the time the letter of credit was established in June of 1971. *See generally* Harfield, *Bank Credits and Acceptances* (5th ed. 1974). It is worthy of note that payment by an irrevocable letter of credit was expressly

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[6] The confirming bank is located in the home country of the seller, and will both notify the seller of the opening of the letter of credit for the seller's benefit, and will confirm payment of the credit's amount to the seller. Thus, the seller may present the required documents and drafts to the confirming bank in its own country instead of being required to forward them to the issuing bank in a foreign land. *See* L. Honnold, *Law of Sales and Sales Financing*, ch. 5, § 5 at 291–95 (1976). In the instant case, the Banque de Bruxelles in Liege, Belgium served as the confirming bank.

contemplated by the Department of the Treasury in promulgating the exemption from the supplemental duty here in issue. *See* Defendant's Exhibit H.

Admittedly, intent is subjective in character and difficult to ascertain. Accordingly, in the determination thereof, the court must rely on the surrounding facts and circumstances, which, when viewed in their entirety, may reflect the state of mind and conscious intention. In so doing, a review of the record in this proceeding does not lend itself to a construction other than to substantiate the contention of the plaintiff.

The evidence appears to clearly establish that at the time the steel was exported from Japan on July 17, 1971, the plaintiff not only had the intention to transship the same to the United States, but had completed *bona fide* contractual arrangements for the handling and care of the merchandise at Antwerp, Belgium while awaiting transshipment as well as for the actual sale and disposition of the steel to the ultimate purchaser, Barsteel, at Toledo, Ohio. No credible evidence with respect to the possibility of the diversion of the merchandise in question to a destination other than the United States is contained in the record. Every contractual agreement carries with it the inherent possibility of change, substitution, modification or non-performance. However, in order to constitute a contingency of diversion sufficient to bear on plaintiff's intent, the possibility of such diversion must have a realistic basis in fact and not mere conjecture.

It is the opinion of the court, therefore, that the plaintiff has sustained its burden of proof and has established by substantial evidence that the merchandise in question herein was "exported to the United States before 12:01 a.m., August 16, 1971" and that, accordingly, said merchandise is exempt from the 10% supplemental duty provided by Presidential Proclamation 4074 within the intendment of Additional Duty Order No. 3.

Plaintiff's motion for summary judgment is, accordingly, granted and the cross-motion of the defendant for summary judgment is denied.

Let judgment be entered accordingly.

(C.D. 4754)

CREATIVE PLAYTHINGS, DIVISION OF COLUMBIA BROADCASTING SYSTEM, INC. *v.* UNITED STATES

Toys—Toy building blocks

Merchandise consisting of 4" foam rubber, cloth-covered cubes packaged in sets of nine and displaying colorful graphic representations of animals, fruit, toys, etc., on four sides and solid colors on

the two remaining sides was classified by Customs under item 737.90, TSUS, as toys not specially provided for. *Held:* The merchandise is properly classifiable under item 737.55, TSUS, as toy building blocks, as claimed by plaintiff.

Court Nos. 73–1–00182, etc.

Port of New York

[Judgment for plaintiff.]

(Decided June 29, 1978)

Barnes, Richardson & Colburn (*Rufus E. Jarman, Jr., Edward F. Christopher* and *Michael A. Johnson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Alan L. Langus* and *Madeline B. Cohen*, trial attorneys), for the defendant.

MALETZ, Judge: The three civil actions consolidated for trial involve the issue as to the proper tariff classification of merchandise invoiced as cloth blocks and cloth bricks which was exported from the United Kingdom and Holland and entered at the port of New York during the period from September 1971 through June 1973. The merchandise consists of 4-inch foam rubber, cloth-covered cubes packaged in sets of nine. The cubes display colorful graphic representations of animals, fruit, toys, etc., on four sides and solid colors on the two remaining sides. Each cube is composed of polyurethane foam with cotton covering sewn over it.

The importations were classified by the government under item 737.90 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9, as toys not specially provided for, and assessed duty at the rates of 21% ad valorem for the 1971 entries and 17.5% ad valorem for the 1972 and 1973 entries. Plaintiff claims that the importations are properly classifiable under item 737.55, TSUS, as modified by T.D. 68–9, which covers toy alphabet blocks; and toy building blocks, bricks, and shapes, and which carries duty rates of 12.5% ad valorem for the 1971 entries and 10.5% ad valorem for the 1972 and 1973 entries.

The relevant statutory provisions are contained in Schedule 7, Part 5, Subpart E, TSUS, and read as follows:

Classified under:		
	Toys, and parts of toys, not specially provided for:	
	* * * * * * * *	
737.90	Other	21% ad val. [1971] 17.5% ad val. [1972–73]

Claimed Under		
737.55	Toy alphabet blocks; and toy building blocks, bricks, and shapes	12.5% ad val. [1971] 10.5% ad val. [1972–73]

The record in this case consists of the testimony of three witnesses and eight exhibits for the plaintiff and three witnesses and six exhibits for the defendant.[1] The record in *1–2 Kangaroo, Inc.* v. *United States*, 66 Cust. Ct. 474, C.D. 4236 (1971), together with the exhibits therein, was incorporated into the record of the present case.

I

Considering first the record, it shows that the imported cubes are designed and merchandised for children between the ages of 1½ and 3 years who use the cubes for stacking and piling, among other things. On the other hand, children under the age of one tend to use the cubes as something cuddly. By contrast, older children of four, five and six years are not interested in the cubes since they are capable of constructing more complicated structures and therefore prefer blocks of varied shapes and sizes which are made of more solid materials such as wood.

Whether the stacking of the cubes by children in the 1½ to 3 year age group constitutes building is a matter on which the experts do not agree. Thus, Dr. Sigel, plaintiff's expert, and all other witnesses with the exception of Dr. Loomonitz, defendant's expert, agreed that stacking is building. Dr. Loomonitz disagreed, being of the opinion that stacking is the precursor of building. Further, all the witnesses agreed that children perform stacking and related simpler activities before they try more complex structures. Additionally, both plaintiff's and defendant's expert witnesses agreed that graphic representa-

[1] The witnesses for plaintiff were: (1) Lester Olinsky, director of product engineering for Creative Playthings, who has seen the subject merchandise being used by children several times; (2) Dr. Irving E. Sigel, a psychologist employed by the Educational Testing Service in Princeton, New Jersey, who has a doctorate from the University of Chicago, whose background and research deal with cognitive development and social behavior of young children, and who has seen the subject merchandise used by children; and (3) Mrs. Virginia D. Hoyt who has sold and advertised the product from her children's clothing and toy store in Brooklyn, New York and has seen children use it in her store.

The witnesses for the defendant were: (1) Dr. Clara Loomonitz, director of the Early Childhood Center at Brooklyn College, and an associate professor in early childhood education since 1958, who holds a doctorate in psychology and early childhood education from Yeshiva University and has observed children playing with building toys but has never personally observed children playing with the subject merchandise; (2) William Heck, a manufacturers' representative for three wooden toy manufacturers, who was formerly a salesman and sales manager for Playskool, Inc., and who has sold various types of building blocks and may have seen the subject merchandise once in a house; and (3) Stephen Miller, New York, New York, who has been the manager-director of Novo Educational and Equipment Corporation since August 1974, and prior thereto had been employed as the president of plaintiff, Creative Playthings, and also held positions as director of product selection, director of product development, and senior vice president of Creative Playthings. Mr. Miller developed the subject merchandise in that he incorporated the idea of adding graphic representations to the sides of the cubes.

tions on blocks, including alphabet letters, are frequently ignored by young children when such blocks are used for stacking or building.

With regard to the design of the importations, the evidence shows that the prototype of the cubes was originally manufactured by Creative Playthings in the United States in sets containing four 4-inch cubes and two rectangular pillars (4″ x 4″ x 8″). The prototype cubes had a foam rubber interior and were covered by a cotton fabric without graphic representations and were designed so as to be useful for building by a child and at the same time to be protective to the child. The following qualities were important in the design of the original cubes: the "forgiving" quality of the foam and cotton covering; the ease of washing and cleaning; the lack of a tendency to stick or slip, as opposed to vinyl or some wooden surfaces; the large size to permit ease of manipulation by small children; and the use of uniform cubes to give impetus to early building activities.

The design of the set was changed in 1969 while Mr. Miller was director of product development at Creative Playthings. Pursuant to Mr. Miller's decision, graphic representations of animals, fruit, toys, etc., were added to four sides of each cube in 1969–70. These graphic representations were an adaptation of cubes designed in the United Kingdom by another company which used graphics as a puzzle feature, that is, when the cubes were assembled in a certain manner a picture was formed. The puzzle feature was eliminated in Creative Playthings' adaptation and replaced with the above-mentioned graphic representations.

The witnesses differed as to whether this new design permitted the product to be recognized as building blocks. On this score, plaintiff's witnesses testified that the design of the imported sets was particularly wellsuited for building by 1½ to 3 year olds for the following reasons: (1) the stability, size and softness of the material enable children of that age range to manipulate the cubes, and the softness eliminates the danger of getting hurt; (2) the lack of variation in shape suits the building requirements of this age group who are just beginning to build; (3) the graphic representations on the cubes do not detract from building but are either ignored or used in a kind of fantasy play which the child sometimes incorporates into the structure; and (4) nine cubes are an appropriate number for building by this age group.

In contradistinction, defendant's expert, Dr. Loomonitz, testified that for a toy to be considered building blocks it must have (1) stability; (2) a variation in shapes with a mathematical relationship of sizes so that the shapes can fit together;[2] (3) simplicity of design; and

[2] Regarding the need for variation in shapes, it is interesting to note that Dr. Loomonitz was of the opinion that a set consisting of *one* shape (such as the Playplax cylinders which were held by the court to be building blocks or shapes in *1-2 Kangaroo, Inc.* v. *United States*, *supra*, 66 Cust. Ct. 474) are *not* building blocks or construction sets even though they were specially designed to fit together.

(4) a sufficient quantity of blocks so that a variety of structures may be built. According to defendant's witnesses, the imported cloth cubes are not suitable for building since they (1) are unstable (i.e., made of lightweight, crushable material which easily falls over); (2) are the wrong size and shape in that they are too large and uniform in size, whereas building blocks must have variations in shape and must, therefore, come in a variety of shapes, such as oblongs, cubes, squares, pillars, triangles, etc.; (3) are designed with graphic representations which may sometimes distract the child from building and which detract from the simplicity of design of traditional building blocks; and (4) are not sufficient in number since the nine cubes cannot offer the variety of experience essential to building or construction.

With regard to the susceptibility of the imported merchandise for building, Dr. Sigel testified that the cloth cubes have the physical characteristics of a block and as such have certain seductive qualities which almost compel stacking and building in the hands of young children; Mr. Olinsky stated that the effect of the graphic representations on the cubes made the product more saleable to the adult purchaser and had little effect on the child; Mr. Heck testified that two year olds could build under a parent's direction; and Dr. Loomonitz acknowledged that it was reasonably probable that a child might start stacking these blocks after experiencing them for a time. It is to be added that defendant's witnesses who testified that the characteristics of the merchandise would detract from its building use did not deny the merchandise could be stacked or applied to some form of building. Indeed, Dr. Loomonitz agreed that the imported cubes were susceptible to some type of building.

Parental or adult acceptance of the merchandise was also a determining factor in the design. Thus, the witnesses agreed that parents and adults accept the merchandise or similar products as building toys.

The record further shows that the toy industry represented the merchandise as building toys for the young child or toddler. This is indicated by plaintiff's catalogues which picture a child stacking the cloth cubes in a building configuration. It is further indicated by the facts that Mrs. Hoyt sold and advertised the merchandise to parents and adults as building blocks and that on her own initiative she used a picture of the imported cubes in an advertisement designed for her store which read "Build a Better Childhood," thus emphasizing the use of the merchandise for building. In addition, defendant's witness from the trade (Mr. Heck) indicated that the trade denominates as building blocks toys for 1½ year old children who, in his opinion, would generally be capable only of stacking.

Finally, a demonstration in the form of a film showing a three year old girl playing with a set of the imported cloth cubes was presented at the trial. The presentation consisted of two reels of film shot in succession with the camera stopped only to change the reels. The record shows that the situation was not rehearsed and that no instructions were given to the child as to how to play with the cubes. During the filming the child repeatedly looked over at the camera in the direction of her mother who encouraged her with such comments as "very nice, honey"; "that's pretty"; and "what is it?" The child had her own set of cloth cubes and had played with the cubes before. During the break for the change of reels, the child's own set of cubes was added to the set she had been playing with and thus in the second half of the film the child played with the two sets. The three year old played with the cubes for the entire duration of the film which ran approximately 10 minutes. Throughout the film, the child was busily engaged in stacking the cubes in towers, sometimes five high; in aligning the cubes to make walls; and in building a semicircle around herself. Also, throughout the film the child ignored the graphic representations on the cubes.

II

Since it is not disputed that the imported cloth cubes are toys within the meaning of Schedule 7, Part 5, Subpart E, the question before the court is whether the imported cloth cubes are classifiable under item 737.55, TSUS, as toy building blocks, as claimed by plaintiff. For the reasons that follow, we find the importations are so classifiable.

At the outset, all the witnesses agreed that the imported cubes are capable of being, and in fact were designed to be, stacked or aligned. Only witnesses Olinsky, Sigel, Hoyt and Miller have seen the product in actual play conditions, and they all agreed that one of the activities engaged in by the young children for whom the cubes were designed and are marketed is such stacking activity.

Against this background, much of the record consists of attempts to determine whether such activities fall within expert and trade understanding of "building" so as to make the subject articles the particular type of toys covered by item 737.55, TSUS. As to this, as previously stated, Dr. Sigel, plaintiff's expert witness, and all other witnesses with the exception of Dr. Loomonitz, defendant's expert witness, agreed that stacking is building. Further, all the witnesses agreed that stacking is a natural stage in the progress of children toward complex building, which may involve making large structures, or a

careful calculation of proportion in the building items. The progression was described by Dr. Sigel as follows (R. 108):

> * * * [W]ith certain kinds of rather small cubes, some children around the first year of life can stack small cubes. One or two, sometimes three. As children get older, the pattern seems to go from a kind of a banging and exploring behavior with them to gradually stacking to eventually building more complex structures. This is a whole transition going from age one to four or five and up. Children play with more complicated blocks from four, five, six and so on and even older, sometimes.

Dr. Loomonitz agreed (R. 174) with a statement to similar effect in chapter 2 of Harriet M. Johnson's *The Block Book*, p. 10 (defendant's exhibit B)—which defendant introduced in evidence as an authoritative publication:

> The first use of blocks among small children is not properly building. Blocks are carried from place to place, or they may be stacked or massed in irregular, conglomerate piles before the period of construction begins. * * * *Between two and three years of age, real construction begins* and has been found to follow broadly three or four lines of development * * *. [Emphasis added.]

An illustration from *The Block Book* (p. 11) indicates that one such development was the construction of a tower of four or five blocks. Further illustrations from *The Block Book* (p. 13) indicate that other such developments are two patterns—a tower and row—which "are *preeminently characteristic of youthful building.*" [Emphasis added.] These are precisely the types of activities which all witnesses agreed children perform with the imported cubes and which are shown in the film and in all relevant catalogues.

In a related vein, defendant's witness Heck testified in part as follows:

> Q. So why would they call them building blocks if they sell them to children one and a half years old?—A. Because a manufacturer gets as wide a spread on age groups as he can get. I know there are some children probably who can interpret blocks with the help of their parents. [R. 221]
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> * * * * * * *
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> Q. * * * A child of two is capable, in your opinion, of stacking only, or can they do some building?—A. I think a child of two can do some building * * * I think a child of two is a more mature child and can receive a little more instruction from his parents who I presume he would receive the blocks from and the direction from the parent. * * * [R. 223–24]

What is more, the record as a whole demonstrates that structures erected by children of the age range for which the imported merchandise is designed are in many cases abstract or representational and are thus not recognizable by adults as real structures. But this is

not relevant. For the fact that such structures are abstract or representational does not mean that the blocks used in their construction preclude them from classification as building blocks. *1–2 Kangaroo, Inc.* v. *United States, supra*, 66 Cust. Ct. at 480.

From the foregoing, it is concluded that for the purposes of the tariff schedules the stacking of blocks by young children with the intent to construct a structure, whether real, abstract or representational, constitutes "building" within the meaning of that term in item 737.55.

It seems clear that the merchandise in question is not used exclusively for the purpose of erecting structures such as towers, walls, bridges, etc. On the contrary, it is a fact of childhood life that many products, while designed with a certain purpose in mind, may be used by children at play in a variety of ways. The record indicates that plaintiff has produced a product which, while leading the very young child toward building, also has subsidiary uses such as chewing, throwing, and sorting. Indeed, according to testimony in this very case, traditional building blocks can also be used, and in fact are used, by children for other nonconstructive purposes. Here the imported cubes were designed so as to permit the young child to engage in subsidiary pursuits without hurting himself.

The record further shows that children in the age range for which the imported merchandise is designed generally tend to ignore specific instructional qualities of the graphics on so-called alphabet blocks, which they are not old enough to comprehend, and fasten upon their building or decorative aspects, quite apart from their purported educational content. Thus Dr. Loomonitz testified (R. 158):

> You know, our children really don't use them much and never have as alphabet things. They have stacked them, lined them up and sometimes looked at a few and sometimes they have used them to decorate their block buildings.

Similarly, here, the record makes clear that children in the 1½ to 3 year age group generally tend to ignore the graphic representations on the cubes and instead stack and align them.

In sum, as previously stated, the record shows that the imported cubes are designed for children between the ages of 1½ and 3 years and that these children use the cubes primarily for stacking and piling. This is emphasized by the fact that the cubic shape of the articles suggests, both to adults and to children, that they can be stacked or aligned to create simple structures. Thus Dr. Sigel testified (R. 117–18):

> As I said earlier, partly the physical characteristics suggest that the nature of the block as a block has a certain seductive quality to young children. It attracts a child to do something. There is something about the object that has its own attractiveness, lends

itself to piling—stacking is a very common behavior observed with children about this age. These objects lend themselves to that function. They almost ask for it. If you lay out a group of objects like this which are cubes or rectangles with flat surfaces, the probability is very high those children will engage in stacking behavior. We don't know why but they do. These objects share those characteristics and that would [be] one reason. Secondly, it would be their quality. They are soft. I think that would suggest it is made for younger children because older children would expect a more solid form like wood. I would have expected more complex variations among them to allow for more complex structures, different sizes, weights, different height. Different shapes which would be characteristic of what you would use for children sort of in the late preschool period like four. * * *

The merchandise was recognized by Mrs. Hoyt, a parent and retailer who had dealt in the merchandise, as a building shape, which appealed to young children largely because of its simplicity, Mrs. Hoyt testified (R. 205–06):

Q. You say you sell this item as a building toy in the store. Tell us what you mean by that.—A. We sell it to an age range of children who are beginning to experiment with shapes other than Teddy bears and soft, cuddly, lovable things. It is our feeling that they are moving out into a world that has other things in it other than Mommy and themselves. And, the simplest form there is, is a cube. It's even on all sides. It just sits there and, in our estimation, the very beginning of building plus having some of the recognizable forms that a little child would go for. It's a transitional bridge for a child. They start off with ideas that will grow into something else. But, it's in the beginning stages. These are in our building department, if you would, because they are the first step a child should make.

In short, the imported merchandise is perceived as a building toy for the very young—an introduction to the concept of shapes. It is an introductory item which a child will outgrow as more sophisticated ideas suggest themselves during development. It may then be replaced by a more traditional building set.

As previously indicated, the record further shows that the toy industry represented the merchandise as building toys for the young child or toddler. This is indicated by plaintiff's catalogues which picture a child stacking the cloth cubes in a building configuration. Also, defendant's witness from the trade, Mr. Heck, indicated that the trade denominates as building blocks toys for 1½ year old children who, in his opinion, would generally be capable only of stacking. Thus Mr. Heck testified (R. 253):

Q. In your opinion, Plaintiff's Exhibit 1 is a stacking block, is that correct?—A. To me it is a soft stacking block.

Q. It is a stacking block, is that correct?—A. Yes, sir.

Previously, Mr. Heck testified (R. 223):

Q. So therefore, if I understand your testimony, stacking, as far as the industry is concerned, is building.—A. I suppose if you are just looking at it from the industry's point of view, yes. But, I am just giving you my opinion.

With regard to retailing, Mrs. Hoyt (as already noted) sold and advertised the merchandise to parents and adults as building blocks; further, on her own initiative, she used a picture of the imported cubes in an advertisement designed for her store which read "Build a Better Childhood," thus emphasizing the use of the merchandise for building.

Additionally, examination of the sample alone, particularly in toy cases, is potent evidence of the chief use of an article. E.g., *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, 40, C.D. 3061 (1967); Sturm, *A Manual of Customs Law* (1974) pp. 226, 394. Examination of the sample here without more indicates that the block-like shape of the cubes with its flat plane on six sides has the characteristic of impelling young children to stack or build. This same conclusion is expressed in the following testimony of Dr. Sigel (R. 117):

> * * * [T]he physical characteristics suggest that the nature of the block as a block has a certain seductive quality to young children. It attracts the child to do something. There is something about the object that has its own attractiveness, lends itself to piling—stacking is a very common kind of behavior observed with children about this age. These objects lend themselves to that function. They almost ask for it. If you lay out a group of objects like this which are cubes or rectangles with flat surfaces, the probability is very high those children will engage in stacking behavior. We don't know why but they do. * * *

Defendant, however, relies upon *Louis Marx & Co., Inc., et al.* v. *United States*, 40 Cust. Ct. 434, Abs. 61534 (1958). In *Marx* the merchandise involved alphabet blocks consisting of 1¼-inch wooden cubes with letters of the alphabet on four sides and outlines and names of animals on the two remaining sides. The testimony indicated that the blocks were educational in that they enabled a child to learn the alphabet. The court found that the alphabet blocks were not toy "building blocks" within the meaning of paragraph 1513 of the Tariff Act of 1930, as amended, on the following basis (p. 436):

> * * * The toy blocks in question * * * are merely small cubes, designed for handling by younger children who could grasp, stack, and knock them down for their amusement. With the use of these blocks, a child might learn the alphabet or possibly get an idea about certain animals. They are totally unlike the building or construction blocks * * * which, by their various shapes and sizes and somewhat peculiar construction, show that they are intended for the amusement of older children capable of putting a collection of the blocks together to create or build some particular object.

Defendant argues that the cloth cubes here involved are extremely similar to the wooden cubes in *Marx* in that they are used by young children merely to grasp, stack, knock down and toss, and are not specifically designed to build structures and objects. In the present case, however, the evidence is quite different. For here, the evidence establishes that the chief use of the importations is for stacking or building by children in the 1½ to 3 year age group. It is true that young children will chew, throw and sort the present cubes, just as they do with other forms of blocks, but such use, as the record demonstrates, is a subsidiary use and not their chief use.

It is also to be noted that *Marx* arose under pre-TSUS law. The claimed provision was paragraph 1513, as amended, providing for toy "building blocks." Obviously, that provision was far more restrictive than the provision involved here, item 737.55, which covers "toy alphabet blocks; and toy building blocks, bricks, and shapes."

In drafting the present item 737.55, Congress clearly intended to prevent classification difficulties with regard to the very question which is presented by this case, by including alphabet blocks—which had been denied classification as building blocks under paragraph 1513 of the Tariff Act of 1930—in item 737.55. In this way, Congress overruled the holding and rationale of the *Marx* case.

The *Tariff Classification Study*, Schedule 7, p. 294 (1960), explains the change as follows:

> Item 737.55 provides for toy alphabet blocks and for toy building blocks, bricks, and shapes, at the rate of 21 percent ad valorem. The existing tariff has, as a result of a trade-agreement concession, a separate rate provision for building blocks or bricks valued at 8 cents or more per pound which are now dutiable at the rate of 21 percent ad valorem. So-called "alphabet blocks", however, are dutiable in the "basket" toy provision at the rate of 35 percent ad valorem, as are building blocks valued at less than 8 cents per pound. *Because there is frequently no significant difference between some toy "alphabet" blocks and toy "building" blocks*, and because there exists some doubt about the tariff classification of construction units in shapes other than "blocks" or "bricks" which frequently are imported with toy building blocks, *item 737.55 was created to cover all of these articles at a single rate of duty.* Imports of alphabet blocks and the low-priced building blocks on which the duty is being changed are believed to be small, and the change in duty is not expected to affect the volume of imports. [Emphasis added.]

It is thus clear that, aware of the distinctions which the *Marx* case had introduced into the classification of toys which might be used for stacking or building purposes by young children, Congress intentionally altered the tariff schedules so as to include in item 737.55 those toys which demonstrated the very stacking, piling, and aligning

features described by the court in the *Marx* case. The phrase "alphabet blocks" was not named by the pre-TSUS statute; it was added by TSUS not to create distinctions, but to eliminate the distinction resulting from *Marx*.

Another case relied upon by the defendant is *Bruce Duncan Co., Inc., et al.* v. *United States*, 47 Cust. Ct. 358, Abs. 66198 (1961), *aff'd on rehearing*, 53 Cust. Ct. 184, C.D. 2493 (1964), *aff'd*, 53 CCPA 90, C.A.D. 882 (1966), which is completely distinguishable from the present controversy. That case decided under paragraph 1513 of the Tariff Act of 1930 involved snap tracks which were conceived, manufactured and commercially sold as parts of train sets. The court held the imported snap tracks were not building blocks on the basis that by their "design and construction, the articles in question are snap tracks fitted for, and dedicated to, use with snap trains." (47 Cust. Ct. at 360.) In the present case, the merchandise is not dedicated to uses other than building. On the contrary, plaintiff's merchandise is dedicated principally to the construction of rudimentary structures. A child's fantasy may allow him to do other things with the merchandise, and it is designed so as not to injure him if he does, but it is in no way dedicated thereby to uses which would remove it from the claimed classification.

Finally, defendant points out that in *1-2 Kangaroo, Inc.* v. *United States, supra*, 66 Cust. Ct. 474, the record showed that the slotted feature of the Playplax units rendered them "capable of being combined in any number of simple or complicated forms or construction, not merely stacks as in the case of alphabet blocks." *Id.* at 480. The slotted feature allowed individual units to be combined in stable fashion. This feature would seem to be too complex for the young children who use the instant cloth cubes. However, within the limitations imposed by the youth of the user, the cloth cubes are suitable for stacking or building by the age group for which they were designed; i.e., children 1½ to 3 years old.

For the foregoing reasons, the court holds that the imported cubes are classifiable under item 737.55 as toy building blocks. Judgment will be entered accordingly.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Reviews

(A.R.D. 324)

ROSS GLOVE COMPANY *v.* UNITED STATES

Leather gloves

The trial court is affirmed in its conclusion that appellant failed to prove that the Belgian linings of these gloves were sold for exportation to the Philippines and further failed to prove the value of the linings in accordance with Philippine law, all of which prevented a determination that the value of the linings was less than 20% of the value of the gloves and precluded a finding that the gloves were Philippine articles entitled to a reduced rate of duty upon importation into the United States.

APPLICATION FOR REVIEW OF REAPPRAISEMENT DECISION 11778

Reappraisement R68/11664

Entered at Milwaukee, Wis.
Entry No. 1499–S.

FIRST DIVISION, APPELLATE TERM

[Affirmed.]

(Decided March 3, 1978)

Law offices *Treumann; Barnes, Richardson & Colburn*, associate counsel; *Walter Treumann, Mark F. Sheridan* and *Joseph Schwartz* of counsel; for the appellant.

Barbara Allen Babcock, Assistant Attorney General (*Wesley K. Caine* and *William Atkins*, trial attorneys), for the appellee.

Before RE, Chief Judge, WATSON and MALETZ, Judges

WATSON, Judge: This is one of the last cases to be decided under a former procedure of this court by which decisions of a single judge

regarding the value of merchandise were reviewed by a panel of three other judges of the same tribunal.[1]

In this instance the question was whether certain gloves imported from the Philippines were "Philippine articles", a circumstance which would entitle them to a reduced rate of duty under a trade agreement in effect between the United States and the Republic of the Philippines.[2] At the heart of the dispute was the question of the value of the gloves' rabbit fur linings, which originated in Belgium and which could not have a value greater than 20% of the value of the gloves if the gloves were to remain Philippine articles within the meaning of the trade agreement.

[1] 28 U.S.C. § 2636(a).

[2] Philippine Trade Agreement Revision Act of 1955, 69 Stat. 413-24:

SEC. 201 AUTHORITY TO REVISE THE 1946 AGREEMENT.

In order to make revisions proposed by the delegations of the Governments of the United States of America and of the Republic of the Philippines in the "Final Act of Negotiations Relative to Revision of the 1946 Trade Agreement Between the United States of America and the Republic of the Philippines" signed at Washington, December 15, 1954, as corrected, the President of the United States is hereby authorized to enter into an agreement with the President of the Philippines revising the executive agreement concerning trade and related matters entered into by the President of the United States and the President of the Philippines on July 4, 1946, so that such executive agreement, as so revised, will read as follows:

"AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF THE PHILIPPINES CONCERNING TRADE AND RELATED MATTERS DURING A TRANSITIONAL PERIOD FOLLOWING THE INSTITUTION OF PHILIPPINE INDEPENDENCE, SIGNED AT MANILA ON JULY 4, 1946, AS REVISED

* * * * * * *

"ARTICLE I

* * * * * * *

"2. The ordinary customs duty to be collected on Philippine articles as defined in Subparagraph (f) of Paragraph 1 of the Protocol, other than those specified in the Schedule to Paragraph 2 of Article II, which during such portions of such period are entered, or withdrawn from warehouse, in the United States for consumption, shall be determined by applying the following percentages of the United States duty as defined in Subparagraph (g) of Paragraph 1 of the Protocol:

* * * * * * *

"(c) During the period from January 1, 1962, to December 31, 1964, both dates inclusive, twenty per centum.

* * * * * * *

"PROTOCOL TO ACCOMPANY THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF THE PHILIPPINES CONCERNING TRADE AND RELATED MATTERS DURING A TRANSITIONAL PERIOD FOLLOWING THE INSTITUTION OF PHILIPPINE INDEPENDENCE, SIGNED AT MANILA ON JULY 4, 1946, AS REVISED

* * * * * * *

"1. For the purpose of the Agreement—

* * * * * * *

"(f) The term 'Philippine article' means an article which is the product of the Philippines, unless, in the case of an article produced with the use of materials imported into the Philippines from any foreign country (except the United States) the aggregate value of such imported materials at the time of importation into the Philippines was more than twenty per centum of the value of the article imported into the United States, the value of such article to be determined in accordance with, and as of the time provided by, the customs laws of the United States in effect at the time of importation of such article. As used in this Subparagraph the term 'value', when used in reference to a material imported into the Philippines, includes the value of the material ascertained under the customs laws of the Philippines in effect at the time of importation into the Philippines, and, if not included in such value, the cost of bringing the material to the Philippines, but does not include the cost of landing it at the port of importation, or customs duties collected in the Philippines. * * *"

* * * * * * *

The single judge found the appellant had failed to satisfy its burden of proving the value of the linings under Philippine law; in particular determining a failure to prove the Belgian linings were sold for exportation to the Philippines and a failure to prove the linings were freely sold by the Belgian manufacturer at the claimed price of $4.82 per dozen pairs.

Appellant asserts the trial judge erred in reaching the above conclusions, in allegedly not applying the relevant Philippine law and in excluding evidence of a sales transaction between appellant and other Belgian manufacturers of rabbit fur linings.

As noted, the valuation of the fur linings is to be accomplished under Philippine law.[3] That law provides for duty to be assessed on the market value or price at which the same, like or similar article is freely offered for sale in the principal markets of the exporting country for exportation to the Philippines.

The trial judge was correct in finding a failure of proof that this merchandise was sold for exportation to the Philippines. Although he emphasized the absence of any mention of the Philippines in the contract of sale between Destelbergen, the seller, and appellant, we do not take this as an indication that the required proof must come from the contract or invoice. In fact, it could well come from another source such as a witness associated with the buyer.

However in this instance, in the confusion engendered by the contract of sale and the provisions for handling of the invoice, it behooved appellant's witness Ross to go beyond the simple declaration that the linings bought from Destelbergen were always shipped to the Philippines or that the merchandise did in fact arrive in the Philippines.

The contract of sale was between Destelbergen and appellant, Ross Glove Company of Sheboygan, Wisconsin (Ross Sheboygan). It provided for a down payment by Ross Sheboygan, the sending of invoices to Carla Trading Corporation, Ltd. in the Bahamas with

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[3] Tariff and Customs Code of the Philippines, Republic Act No. 1937.

SEC. 201. *Basis of Dutiable Value.*—Whenever an imported article is subject to an *ad valorem* rate of duty, the duty shall be assessed upon the market value or price at which, at the time of exportation, the same, like or similar article is freely offered for sale in the principal markets of the exporting country for exportation to the Philippines, in the usual wholesale quantities and in the ordinary course of trade (excluding internal excise taxes to be remitted or rebated), plus ordinary expenses prior and incidental to the lading of such article on board the vessel or aircraft at the port of export (including taxes or duties, if any) and freight paid as well as insurance premium paid covering the transportation of such article to the port of entry in the Philippines.

When the value of the article cannot be ascertained in accordance with the preceding paragraph, the value shall be the domestic wholesale market value or selling price of the same, like or similar imported article in the principal market of the Philippines on the date of exportation of the article under appraisement, in the usual wholesale quantities and in the ordinary course of trade, minus the import duty and other taxes as well as a commission not exceeding six *per centum* if any has been paid or contracted to be paid on goods secured otherwise than by purchase, and profits not to exceed eight *per centum* and a reasonable allowance for general expenses not to exceed eight *per centum* on purchased goods, and all other expenses incidental to the delivery from the port of importation to the principal market in the Philippines.

copies to Ross Sheboygan, and delivery of the merchandise to a forwarding firm in Antwerp subject to the disposition of Ross Sheboygan. In the face of the plausible inference that shipment to the Philippines was entirely the work of appellant concerning which the seller had no knowledge, it would be reasonable to require appellant to produce evidence from which it could be inferred the seller made the sale for exportation to the Philippines.

Appellant cites its expert witness on Philippine law, Mr. Bito, for the proposition that a sale is for exportation to the Philippines if the goods are exported to the Philippines. This was not his testimony and ignores the fact goods may be shipped to places that are not within the contemplation of the seller. It is therefore not the fact of shipment to, or arrival in, the Philippines which is paramount but the fact the Philippines was the seller's contemplated destination for the merchandise.

Consequently, appellant's meticulous tracing of the shipment from Belgium to its bonded entry in the Philippines could not provide proof which must come from evidence relating to the sale and the intentions with which it was made, namely that it was made for exportation to the Philippines within the meaning of the Philippine law.

In sum, as elementary as proof of this point seems and as easily proven as it ordinarily ought to be, it is lacking in the somewhat tangled circumstances of this case. The trial judge was correct in pointing this out.

The trial judge was also correct in concluding appellant failed to prove the fur linings were freely sold by Destelbergen within the meaning of the Philippine statute. Interpretation of the Philippine law by reference to the similar United States law and cases decided thereunder was proper. *Daniel Lumber Co.* v. *Empresas Hondurenas, S.A.*, 215 F. 2d 465, 470 (5th Cir. 1954). See, for example, *Dunlap, et al.* v. *United States*, 43 CCPA 159, C.A.D. 624 (1956); *Veolay, Inc., J. E. Bernard & Co., Inc.* v. *United States*, 23 CCPA 101, T.D. 47766 (1935), *cert. denied*, 297 U.S. 711 (1935). There was no proof that Philippine law differed from United States law to any significant extent, certainly not to the extent of deriving an export value solely from the transaction in dispute or reaching a conclusion as to whether the same or similar merchandise was freely sold, only from the testimony of a buyer who did not display a familiarity with the overall practices of the seller.

In this respect, moreover, the trial judge was not bound by the expert witness' ultimate conclusions as to the value of these linings under Philippine law. That was a question for the judge to decide. *Finney* v. *Guy*, 189 U.S. 335 (1903). In addition, the witness' conclusion was at odds with the underlying analytical factors he expressed.

He clearly stated that a determination that merchandise was "freely sold" would depend on proof that all who wanted to purchase could purchase; a factor which is evidently the same in Philippine law as in United States law. *F. B. Vandergrift & Co., Inc.* v. *United States*, 56 CCPA 105, C.A.D. 962, 410 F. 2d 1259 (1969). See also, *Mannesmann-Meer, Inc.* v. *United States*, 58 CCPA 6, C.A.D. 995, 433 F. 2d 829 (1970). Yet proof of this point was strikingly absent from the testimony of Ross. In its place was testimony limited to appellant's business relationship with Destelbergen which could hardly be viewed as revealing Destelbergen's conduct with respect to other willing purchasers. In fact, Ross' testimony contained suggestions the claimed price was arrived at by offer and counteroffer between Destelbergen and Ross, a procedure which would be at variance with the existence of a single price at which Destelbergen was willing to sell to everyone for export to the Philippines.

We do not read the trial judge's decision as faulting appellant's proof only because it did not bring forward testimony from the seller, nor does the decision express an absolute requirement that proof the merchandise was freely sold must come from the seller. Such an unvarying requirement would be error because the well-informed buyer may have sufficient familiarity with a seller's business conduct to provide persuasive testimony. Here, however, Mr. Ross gave no sign of being sufficiently familiar with Destelbergen's selling conduct to support a finding its fur linings were "freely sold". In that context the trial judge's characterization of the need for evidence from the seller as a "must" was accurate.

On the subject of the price at which such or similar fur linings were freely sold, the only remaining evidence was of sales by the Belgian firm of Scaldis to the firm of M. Frenville & Co. However, those sales were not relevant because they were sales to a selected purchaser and were not for export to the Philippines.

Appellant attempted to introduce evidence of its purchases of fur linings from a third Belgian seller, the firm of Block. Appellant offered as proof a letter from Block offering linings at $4.95 for the months of April, May, June and July of 1962 and copies of invoices sent to Carla Trading Corporation, Ltd. allegedly showing shipments of linings in March and April of 1962. The trial judge excluded this evidence because the March invoice did not have the year 1962 written on it and because no proof of payment by appellant in the form of canceled checks was offered.

The exclusion of this evidence was error although it was harmless. It was error because it required a degree of perfection in the proof of a sales transaction beyond that which is reasonable. The invoice for March lacked the year but could be chronologically placed, by virtue

of the sequence of its bale numbers, with those on the April invoice (which did have the year 1962 on it), as well as by the direct testimony of the appellant's president. In addition, documentary proof of payment is not a prerequisite to the admission of other evidence as to the occurrence of a transaction. Whatever defects may be discerned in the evidence were not such as would render it inadmissible by any of the prevailing standards of admissibility although they might properly affect the weight given to it.

Although this exclusion was error, it was ultimately harmless because the tendency of the excluded evidence was to prove a lining price of $4.95 per dozen, higher than the freely offered lining price of $4.82 per dozen claimed to exist in the transaction at issue. The $4.95 price might itself lead to a total value of the linings which is still less than 20% of the total value of the gloves. However, it was appellant's burden, not to prove a variety of costs and values, all falling under the 20% limitation, but to prove first and foremost that its claimed $4.82 price was the price at which these linings were freely offered for sale. Proof of a higher price would not accomplish this.

For the above reasons the court makes the following findings of fact and reaches the following conclusions of law:

Findings of Fact

1. That the merchandise in issue consists of 624 dozen pairs of fur-lined men's leather gloves which were manufactured in the Philippines with fur linings which were not of Philippine or United States origin, and which were exported from the Philippines to the United States on or about August 31, 1962;

2. That said merchandise was appraised upon entry at the port of Milwaukee, Wisconsin, at $25.77 per dozen pairs, net, packed, on the basis of constructed value as defined in section 402(d), Tariff Act of 1930, as amended, 19 U.S.C. § 1401a(d);

3. That the value of the said fur linings was not ascertained by the Philippine customs officials under the customs law of the Republic of the Philippines at the time of their importation into the Philippines; and

4. That a value for said fur linings was not subsequently proven, in accordance with said Philippine law, in the proceedings herein.

Conclusions of Law

1. That appellant-importer has failed to establish that the merchandise in issue constitutes "Philippine article[s]" within the contemplation of paragraph 1(f) of the protocol to the revised executive trade agreement between the United States and the Philippines, as

authorized by section 201 of the Philippine Trade Agreement Revision Act of 1955, 69 Stat. 413, 424, 22 U.S.C. § 1372;

2. That constructed value as defined in section 402(d), Tariff Act of 1930, as amended, 19 U.S.C. § 1401a(d), is the proper basis for the determination of value of the subject merchandise;

3. That such constructed value is the appraised value herein; and

4. That the decision and judgment of the single judge, sitting in reappraisement, on remand, is affirmed.

Judgment will be entered accordingly.

(A.R.D. 325)

UNITED STATES *v.* ERNEST LOWENSTEIN, INC.

Glass stones and beads

EXPORT VALUE—PRICE FAIRLY REFLECTING MARKET VALUE

The trial court's determination of export value predicated upon the prices at which the foreign manufacturer sold the merchandise to a selected purchaser for export to the United States is affirmed, since the record establishes that the selected purchaser's prices fairly reflected the market value of the merchandise within the meaning of section 402(f)(1)(B) of the Tariff Act of 1930, as amended. Appellant's evidence that merchandise identical to that in issue was sold at the secondary level of distribution to a purchaser in the United States (other than appellee) at prices equivalent to the appraised export values of the merchandise in issue does not support the appraised values, inasmuch as the appraisement concededly was not predicated upon sales of the merchandise at the secondary level of distribution, and there is no presumption or evidence that the sales at the secondary level relied upon by appellant were made in the ordinary course of trade or in the principal markets of the country of exportation.

APPLICATION FOR REVIEW OF REAPPRAISEMENT DECISION 11779

Court No. R64/2246

Entered at New York, N.Y.
Entry No. 996721.

SECOND DIVISION, APPELLATE TERM

[Affirmed.]

(Decided May 22, 1978)

Barbara Allen Babcock, Assistant Attorney General (*Glenn E. Harris*, trial attorney), for the appellant.

Siegel, Mandell & Davidson (*Steven S. Weiser* and *Harvey A. Isaacs* of counsel) for the appellee.

Before RAO, FORD and NEWMAN, Judges

NEWMAN, Judge: This case is before us on application by the Government (defendant below) for review of the decision and judgment of the trial judge (Maletz, J.) in *Ernest Lowenstein, Inc.* v. *United States*, 78 Cust. Ct. 169, R.D. 11779, 425 F. Supp. 856 (1977), sustaining the dutiable export values claimed by appellee (plaintiff below).

The importation consisted of certain glass stones, pendants, beads, and similar merchandise (hereafter, stones and beads) that were exported from Austria in March 1963 and entered at the port of New York (consumption entry No. 996721) in April 1963. The imported merchandise was appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. § 1401a(b)), at the invoiced unit prices plus 14.3 percent. These appraised values represent the "world list prices" published by the Austrian manufacturer, D. Swarovski & Co. (Swarovski).[1]

Appellee concedes that export value is the proper basis for appraisement, but claims that the proper dutiable values are the appraised values (viz., "world list prices") less 15 percent. These claimed values represent the prices at which the manufacturer sold the stones and beads to Lowenstein Overseas Company (LOC), its "selected purchaser" within the purview of section 402(f)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. § 1401a(f)(1)(B)).[2]

As stated above, Judge Maletz sustained appellee's claimed values. We affirm.

STATUTES INVOLVED[3]

The pertinent provisions of section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. § 1401a), read:

(b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of ex-

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[1] The merchandise was invoiced to appellee by Lowenstein Overseas Company of Liechtenstein (LOC), appellee's parent company, but was shipped directly by the manufacturer from Austria to appellee in New York. The prices at which Swarovski invoiced LOC were its world list prices less 15 percent, and LOC in turn invoiced the appellee at the world list prices less 12.5 percent. Thus, the prices invoiced to appellee were 87.5 percent of the world list prices. Increasing these prices, as the appraiser did by 14.3 percent, caused the appraised values to equate with the world list prices without discount, and the appraised values are expressly based upon them.

[2] The "selected purchaser" provision in section 402(f)(1)(B) applies where the seller "*selects* one or more purchasers, restricting its sales to them and not selling or offering its merchandise for sale to all purchasers at wholesale". *Aceto Chemical Co., Inc.* v. *United States*, 51 CCPA 121, 127, C.A.D. 846 (1964); *Judson Sheldon International Corporation, Inland Woods International* v. *United States*, 67 Cust. Ct. 577, 580, A.R.D. 295, 331 F. Supp. 1393 (1971). It is undisputed that LOC was a "selected purchaser" within the purview of the statute.

[3] The merchandise is not specified on the "Final List", T.D. 54521.

portation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

(f) DEFINITIONS.—For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchasers, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

THE RECORD

The record comprises the oral testimony of two witnesses called by appellant and various documentary exhibits submitted by both parties. Appellant's witnesses were: Egon Rausnitz, a partner in the Wepra Company (Wepra); and Abraham Frankel, secretary and treasurer of Fred Frankel & Sons, Inc. (Frankel).

The record establishes the following relevant facts:

It appears that the imported stones and beads, used primarily for making costume jewelry, were manufactured in Wattens, Austria by Swarovski, the sole manufacturer in that country of "such or similar" articles. All sales for exportation to the United States of Swarovski stones and beads from Austria were handled administratively in Wattens. Swarovski published and circulated to its customers a "world price list" covering the merchandise.

Swarovski had a distributorship agreement with LOC, a totally unrelated company located in Liechtenstein. Under that agreement, LOC was appointed as the exclusive distributor for the sale of Swarovski stones and beads in all countries throughout the world, except Europe. LOC purchased the Swarovski stones and beads for exportation to the United States at the manufacturer's world list prices less a discount of 15 percent [4]—which prices are claimed by appellee to represent the correct dutiable export values of the merchandise.

[4] Swarovski's prices did not vary with the quantities sold, and the only restriction upon LOC's use of the merchandise was that its resales be limited to the assigned territories, including the United States.

Appellee was, in turn, the sole or exclusive United States purchaser of the Swarovski merchandise sold to LOC, which firm in its resales invoiced appellee at Swarovski's list prices less 12.5 percent. Under the sales practice prevailing at the time, when LOC received an order from appellee, LOC placed an identical order with Swarovski and instructed the latter to ship the merchandise directly from Wattens, Austria to appellee in the United States. Through this reinvoicing procedure and direct shipment by Swarovski to appellee in the United States, the merchandise never physically entered the commerce of Liechtenstein, and therefore the country of exportation was Austria and not Liechtenstein.

In addition to sales of stones and beads by Swarovski for exportation to the United States through LOC, two firms in the United States, Wepra and Frankel, imported the Swarovski articles during the time of the instant importation by appellee.

Frankel imported Swarovski's stones and beads from Dr. Josef Russ, a seller in Linz, Austria who had in turn obtained the merchandise from Neuman and Wenzel, a manufacturer of costume jewelry in Linz, which firm in turn purchased the stones and beads from Swarovski. Although Frankel was on a third level of sales (viz, there were two intervening sellers after Swarovski), Frankel was buying the merchandise at 10 percent below Swarovski's world list prices.

Prior to 1965, Wepra was engaged primarily in wholesaling stones and beads, obtained mostly from appellee. However, during 1962 and 1963, Wepra purchased Swarovski stones and beads at the world list prices from Internationale Export Etabl. of Vaduz, a Liechtenstein firm, at a time when there was a shortage of supply from appellee. Appellee supplied approximately 90 to 95 percent of Wepra's needs, and Wepra's supplemental purchases from the Liechtenstein firm were insubstantial compared with its purchases from appellee.

Decisions of the Trial Court

In its initial decision (71 Cust. Ct. 201, 204, R.D. 11776, 367 F. Supp. 1330 (1973)), the trial court stated: "The sole issue, as the parties agree, is whether the prices paid by LOC to Swarovski—i.e., list, less 15 percent—fairly reflect the market value of the merchandise within the meaning of section 402(f)(1), as amended, and, hence, represent statutory export value [footnote omitted]". Following *United States* v. *Acme Steel Company*, 51 CCPA 81, C.A.D. 841 (1964) and a line of decisions predicated on that case, Judge Maletz found that appellee had failed to satisfactorily reconcile the disparities between Swarovski's discounted prices to its selected purchaser (LOC) and its varying prices, whether at discount or at list prices,

for domestic consumption in Austria and for sales to third countries. Accordingly, in its first decision the trial court held that plaintiff failed to establish that the prices to LOC fairly reflected the market value of the merchandise and affirmed the appraised values.

In due course, an application for review of the initial decision was filed by plaintiff, appellee herein. After briefs had been submitted and oral argument presented, and while the case was *sub judice*, the Court of Customs and Patent Appeals handed down its decision in *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F. 2d 1400 (1974). In *J. L. Wood*, our appellate court abolished much of the established criteria for determining whether a price to a selected purchaser fairly reflects the market value of the merchandise, upon which the trial judge had relied in his first opinion.[5]

More specifically, *J. L. Wood* "overruled" *Acme Steel* "to the extent that it approved consideration of sales in the domestic market of the exporting country in the determination of export value", holding (62 CCPA at 32–33):

> * * * Although the term "market value" in subdivision 402(f)(1)(B) was not defined in the Act, it obviously must relate to the relevant market. In the case of export value, this would be the export market in the exporting country to the United States and *not the foreign domestic market*, since use of the latter would result in a determination of foreign value, which was deleted by the Act.
>
> From the foregoing, we conclude that Congress clearly intended that export value be determined by considering *only the exporting country's market for exportation to the United States* and that sales at wholesale to exclusive or selected agents be used in determining export value if the prices fairly reflect the market value. *United States* v. *Acme Steel Co.*, 51 CCPA 81, C.A.D. 841 (1964) is hereby overruled to the extent that it approved consideration of sales in the domestic market of the exporting country in the determination of export value. * * *
>
> * * * * * * *
>
> The "market value" which must be fairly reflected according to subdivision 402(f)(1)(B) is the market value for exportation to the United States (i.e., export value), and this is the price which the merchandise is able to command in the market for exportation to the United States. [Footnotes omitted; emphasis added in part].

In light of the *J. L. Wood* decision, this Division by an order dated April 3, 1975, *sua sponte* remanded the within case to the trial court "for all purposes" (74 Cust. Ct. 189, A.R.D. 322 (1975)). Thereafter,

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[5] Judge Landis observed in *The American Greiner Electronic, Inc.* v. *United States*, 79 Cust. Ct. 92, 96, C.D. 4718 441 F. Supp. 915 (1977): "The *Wood* decision has rendered obsolete much, if not all, of the case law that preceded it as to the kind of proof considered relevant in determining that a price to a selected purchaser fairly reflected market value". See also *D. H. Baldwin Co. et al.* v. *United States*, 78 Cust. Ct. 164, C.D. 4704 (1977), *appeal pending*.

the case was reopened for further evidence, and appellant recalled its witnesses Rausnitz and Frankel, who had testified at the first hearing. Appellee presented no additional evidence.

In his second decision (under review here), Judge Maletz, following "the new formula, as enunciated in *Wood*", commented (78 Cust. Ct. at 175):

> * * * if the "market value" which must be fairly reflected in sales to selected purchasers is the "price which the merchandise is able to command in the market for exportation to the United States" (62 CCPA at 33), all export sales to purchasers in the United States, unless made under abnormal or irregular conditions, are appropriate for consideration in determining statutory export value. Indeed, as this court reads *Wood*, such sales constitute the only relevant market evidence against which the prices to the selected purchaser may be compared in determining "market value".
>
> *Viewed in this perspective, the record, as supplemented after remand to this court, takes on a different dimension.* * * * [Emphasis added].

Turning to the record, as supplemented after remand, the trial court disregarded the evidence concerning sales to Wepra as "vague, inconclusive and, moreover, as having been directed in part to sales for export from Liechtenstein which, of course, is not the 'country of exportation' for purposes of the valuation statute". (78 Cust. Ct. at 176, n. 4). Judge Maletz also noted that Rausnitz' (Wepra's) purchases of the additional Swarovski items "were insubstantial compared to his purchases from plaintiff-Lowenstein, which constituted approximately 90 to 95 percent of the total" (78 Cust. Ct. at 175).

On the other hand, the trial judge held that the sales to Frankel fully support appellee's claim that Swarovski's prices to LOC fairly reflected the market value of the merchandise. Thus, the court said (78 Cust. Ct. at 176):

> We find that the sales to Frankel were substantial, regular and made in the ordinary course of trade at the third level of distribution; and that the prices paid by Frankel at this level may be easily equated with—at the very least, they approximate—the prices paid by LOC at the primary level to the manufacturer. More particularly, the fact that two intervening parties (i.e., Neuman and Wenzel, and Dr. Russ) could buy and sell this merchandise, presumably making a profit on each transaction, and the resultant sale to a United States purchaser (Frankel) was only 5 percent higher than to a purchaser (LOC) buying directly from the manufacturer is in the court's view clear indication that the latter sale fairly reflects the market value of the goods. We find, therefore, that the sales to Frankel fully support plaintiff's claim that Swarovski's sales to LOC at the list price, less 15 percent, fairly reflect their market value [footnote omitted].

Moreover, Judge Maletz found no evidence in the record that the dealings between the manufacturer and its unrelated selected pur-

chaser were anything but at arm's length and *bona fide* in all respects. In the trial court's view, the status of LOC as an unrelated selected purchaser is analogous to the status of the unrelated selected purchasers in *J. L. Wood*, whose purchase prices were considered by the Court of Customs and Patent Appeals as demonstrative that the prices to a related selected purchaser fairly reflected the market value of the merchandise. The trial judge thus opined that it would be completely illogical to accord LOC's prices a less or different status because of the absence in this case of a related purchaser.

Finally, the trial court held that where, as here, the sole manufacturer of the merchandise in the country of exportation (Swarovski) sold to a wholly unrelated company (LOC) without restriction as to the disposition or use of the merchandise in the United States, "the price between the parties is not one which merely 'fairly reflects' market value, it is *the* market value of the merchandise within the statutory understanding" (78 Cust. Ct. at 177). (Trial court's emphasis).

Accordingly, appellee's claimed values were sustained as the proper dutiable export values of the merchandise.

OPINION

Briefly stated, the issue is whether the trial court correctly determined that the proper dutiable export values of the merchandise were the appraised values less 15 percent.

Although initially it may appear somewhat anomalous that appellee is claiming, and the trial court found, export values *lower* than the prices at which LOC invoiced the merchandise to appellee (Swarovski's list prices less 12.5 percent), it must be borne in mind that the merchandise was not exported from Liechtenstein by LOC (the merchandise never having entered the commerce of that country), but rather exported from Austria by Swarovski. Since the merchandise was destined for exportation to the United States at the time it was sold by Swarovski to LOC at list prices less 15 percent, such sale was "for exportation to the United States" within the meaning of section 402(b), there being no requirement that the *purchaser* be located in the United States. See the trial court's initial opinion, 71 Cust. Ct. 201, 204, n. 7. The foregoing construction of the statute is undisputed by appellant.

From the two decisions of the trial judge, it is evident that the sole issue tried, briefed and decided was whether appellee had met its burden of proving that the manufacturer's prices to its selected purchaser fairly reflected the market value of the merchandise within the ambit of section 402(f)(1)(B). In seeking reversal, appellant has now admittedly "reversed its field" and insists that the merchandise

was freely sold to "all purchasers at wholesale" within the purview of section 402(f)(1)(A); and that therefore "it is improper under the statute [section 402(f)(1)] to have recourse to a 'selected purchaser' price for export value purposes, notwithstanding that the 'selected purchaser' sales were made by Swarovski itself". (Appellant's brief, p. 19).[6] Appellant further contends that the trial court erred in relying upon the prices paid by Frankel to support its conclusion that the manufacturer's prices to LOC fairly reflected the market value of the merchandise.

Appellee argues that Swarovski's prices to LOC fairly reflected the market value of the merchandise, but that the trial court should have disregarded the sales to Frankel as well as to Wepra. Further, appellee disputes appellant's assertion that section 402(f)(1)(A) takes precedence over section 402(f)(1)(B), insisting that "the legislative history reveals that these sections must be read together * * *". (Appellee's brief, p. 14).

This case has been exhaustively tried, thoroughly briefed, and ably argued orally by counsel for both parties. From our review of the record and Judge Maletz' meticulously prepared opinion, we find that he has made a very perceptive and searching analysis of the evidence, and we are in complete accord with his findings of fact and conclusions of law.

At this juncture, we must stress that the initial decision of the trial court sustaining the appraised values was rendered in accordance with *Acme Steel* and before the decision by the Court of Customs and Patent Appeals in *J. L. Wood*. Understandably, therefore, the trial court's rationale and the result reached in its second decision which followed *J. L. Wood* were quite different from the rationale and the result reached in the first decision upholding the appraisement.

Although we could readily pause here and affirm the judgment of the trial court, we wish to comment on the new theory urged by appellant that at the secondary level of sales the stones and beads were

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[6] We have noted that at the first oral argument before this Division the Government conceded that the appraisements could not be sustained on the basis of sales to all purchasers at wholesale at the secondary level of sales. Thus, the transcript shows the following (Tr. 27, 41–42):

"MR. HARRIS: * * * One of the things we did attempt to do at the trial was to determine if there were free sales of these beads and stones from sellers other than D. Swarovski & Company, and the evidence showed otherwise. Now, to that extent, he can say, truthfully, that we have not substantiated our appraisement because our appraisement could have been sustained on the basis of such evidence as that, but it showed otherwise.

* * * * * * *

MR. HARRIS: * * * However, regardless of whether anyone else on the secondary level of sales was selling—was freely selling this merchandise for export to the United States, one must still first take the price of Swarovski to Lowenstein Overseas Corporation because that is the primary level of sales, and that would prevail. Anything beyond that is irrelevant at this point. We are at the point of whether there is a value at the primary level of sales. So, everything else is moot because that deals with the secondary level of sales. * * *"

Moreover, in its post-trial brief after remand, page 12, n.5, defendant (appellant) urged: "It is apparent that Fred Frankel & Sons, Inc. and the Wepra Company were likewise *selected purchasers*, though on the secondary level of sales". (Emphasis added).

freely sold at the appraised values to "all purchasers at wholesale" within the purview of section 402(f)(1)(A).

In this connection, appellant argues that the trial court erred in disregarding the evidence of sales to Wepra, as shown by exhibits T through Z, which comprise photocopies of certain entries made by Wepra late in 1962 and early 1963 and the special customs invoices accompanying those entries.

We are not persuaded that exhibits T through Z support the Government's appraisement, since there is no evidence that the sales to Wepra by the Liechtenstein seller, Internationale Export, were made in the ordinary course of trade or in the principal markets of Austria.

A dash of reality is useful—makes the point more succinctly, and supports it more sharply with evidence! The record is clear that Wepra's importations of the additional Swarovski articles were made solely under conditions of short supply of the merchandise from appellee, Wepra's regular supplier (R. 84, 133–34). Moreover, we find no basis in the record for holding that Linz, Austria was *a* principal market, as now contended by appellant. The parties have stipulated that there is no issue concerning "principal markets" (see trial court's Memorandum and Order on Pretrial Conference, p. 4, December 9, 1969); and further, in its present brief (p. 9) appellant conceded: "No question is presented concerning the location of *the* principal market for the merchandise in Austria, which obviously was Wattens, the location of the general administrative offices of Swarovski". (Footnote omitted; emphasis added).

In sum, the evidence fails to establish that the merchandise was freely sold to all purchasers at wholesale at the secondary level of sales at prices equivalent to the appraised values. The appraisement admittedly was not predicated upon sales at the secondary level, and there is no evidence that sales at the secondary level to Wepra were made in the ordinary course of trade or in the principal markets of Austria.[7] Consequently, we need not reach appellant's contention that determination of export value pursuant to section 402(f)(1)(B) is precluded when there are sales to all purchasers at wholesale at the secondary level.[8] We find that the presumption of correctness attach-

[7] In its post-trial brief after remand, p. 12, defendant (appellant herein) conceded that "the appraisement of the involved merchandise had been premised on the sales to other purchasers in the United States having been free sales by *Swarovski*, and that the evidence had failed to substantiate that premise". (Emphasis added). In view of this concession, we see no basis for any subsidiary presumption in this case that the sales to Wepra by the *Liechtenstein firm* were in the ordinary course of trade or in the principal markets of Austria.

[8] The Government argued to the contrary in its post-trial brief before remand (p. 21) and at the first oral argument (Tr. 41–42) that sales at the secondary level by someone other than the manufacturer, were "irrelevant" or "moot", since such sales could *not* be looked to for export value purposes in preference to sales directly by the manufacturer at the primary level. Appellant has now changed its position on this point, urging that sales within the purview of section 402(f)(1)(A) at a secondary or lower level of distribution take precedence over direct sales by the manufacturer at the primary level to a selected purchaser within the purview of section 402(f)(1)(B).

ing to the appraised values has been overcome by appellee, and that under the facts of this case the trial court has properly applied the selected purchaser provision of the statute (section 402(f)(1)(B)) in determining the proper dutiable export values of the merchandise. Therefore, we find no reversible error in the decision and judgment of the trial judge, and affirm. The findings of fact and conclusions of law in the opinion of the trial judge are hereby adopted as our own, and incorporated herein by reference.

Judgment will be entered accordingly.

The court wishes, again, to commend counsel for the respective parties in this case for their excellent briefs and oral arguments which have been most helpful to us in considering the issue presented.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Valuation Decision on Remand from Protest Proceedings

(V.D. 158)

GENE MILLER
ATWOOD IMPORTS, INC., ET AL. *v.* UNITED STATES

Remand of protests 65/19576, etc.

Entered at Los Angeles, Calif.
Entry Nos. 55538, etc.

(Decided April 26, 1978)

Glad & Tuttle (*Robert Glenn White* of counsel) for the plaintiffs.
Barbara Allen Babcock Assistant Attorney General (*David M. Cohen*, Chief, Customs Section), for the defendant.

DECISION AND JUDGMENT

FORD, Judge: The protests involved herein, and as listed on the attached Schedule "A", are on remand to a single judge sitting in reappraisement, pursuant to 28 U.S.C. § 2636(d), in consequence of the decision in *Gene Miller, Atwood Imports, Inc., et al.* v. *United States*, 67 Cust. Ct. 50, C.D. 4249 (1971), for the purpose of determining the proper dutiable values of certain woodworking machines and accompanying electric motors, also as hereinafter identified. Against this background, this judge to whom the protests were remanded makes the following findings of fact and conclusions of law, as agreed to by stipulation of the parties:

FINDINGS OF FACT

1. The merchandise covered by these protests consists of other woodworking machines which are not on the Final List (T.D. 54521) promulgated by the Secretary of the Treasury pursuant to the Customs Simplification Act of 1956, and accompanying electric motors which are on the Final List, (T.D. 54521) promulgated by the Secretary of the Treasury pursuant to the Customs Simplification Act of 1956.

2. On or about the date of exportation of the above-referenced woodworking machines, the price at which such or similar merchandise was freely sold or, in the absence of sales, offered for sale to all purchasers in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for the shipment to the United States, was as follows:

Protest No.	Entry No.	Machine(s)	Unit Price: (U.S. dollars)
65/19576	55538	(2) Multiple Rip-Saws, Model H–34	$5,500.00 each
65/19577	60411	Schubert Hydraulic Press, Type HH 3.m	$1,680.00
65/19581	41054	(6) Rye Type PD/3 Single Spindle Drilling Units	$ 147.16 each
		(20) Rye Type PD/3 Twin Spindle Drilling Units	$ 222.95 each
65/19585	34716	Rye Type H/2 Single Spindle Slot Morticer	$1,514.00
65/19629	65472	Ehemann Universal Edge Belt Sander	$1,188.00
65/19632	59908	Wadkin Hydro-Electric Cross-cutting and Trenching Machine Model C.J.4	$2,310.00
		Wadkin 18″ Tilting Arbor Dimension Saw	$ 975.00
		Bursgreen 12″ Surface Planer and Joiner, Model B.F.T.	$ 890.00
		Wadkin-Bursgreen 14″ Tilting Arbor Fixed Table Dimension Saw	$ 954.00

3. On or about the date of exportation of the above-referenced electric motors, the price at which such a similar merchandise was freely offered for sale to all purchasers in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses

incidental to placing the merchandise in condition, packed ready for shipment to the United States, was as follows:

Protest No.	Entry No.	(U.S. dollars)
65/19576	55538	Two 6.1 H.P. motors, $175.50 ea
		Two 3 H.P. motors, $145.00 ea
65/19577	60411	One 1.5 H.P. motor, $41.00
65/19581	41054	Six motors, $20.00 ea
		Twenty motors, $21.50 ea
65/19585	34716	Two motors, $93.00 ea
65/19629	65472	One motor, $20.00
65/19632	59908	Two motors, $19.00 ea
		One motor, $10.00
		One motor, $15.00
		One motor, $9.00

Conclusions of Law

1. Export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, is the proper basis for determining the value of the woodworking machines involved herein.

2. The correct export value for the above-referenced woodworking machines is the unit price, in United States dollars, as stated in paragraph 2 of the Findings of Fact.

3. Export value, as defined in section 402a(d), Tariff Act of 1930, is the proper basis of appraisement of the said electric motors, there being no other value higher than that value.

4. The correct export value for the above-referenced electric motors is as specified in paragraph 3 of the Findings of Fact herein, in U.S. dollars as stated therein.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 78–1)

PISTORINO & CO., INC. *v.* UNITED STATES

Memorandum Opinion to Accompany Order

Court No. 68/45733

Women's wearing apparel

[Motion granted.]

(Dated May 10, 1978)

Glad, Tuttle & White (*Stephen S. Spraitzar* of counsel), the moving attorneys.
Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: Attorneys, Glad, Tuttle & White of San Francisco, have filed a motion to have the Court papers (without entries, invoices, or laboratory reports) in the above-entitled action, which was decided September 21, 1972 and reported in *Pistorino & Co., Inc.* v. *United States*, 69 Cust. Ct. 93, C.D. 4378, forwarded to the District Director of Customs at San Francisco, for review, to which the Government has filed a response deferring the granting of said motion to the discretion of the Court. The plaintiff in the above-entitled action, represented by other counsel, has not responded to this motion.

The question here presented is whether the moving attorneys (Glad, Tuttle & White of San Francisco, California) who did not appear in the captioned case, and who do not profess to represent either of the parties in said captioned case, may obtain an Order of this Court forwarding the Court papers (other than entries, invoices, or laboratory reports) to the District Director of Customs at San Francisco, California for review, after which they shall be returned to the Clerk of this Court.

Rule 14.3(b)(1) provides:

> Except where restricted by law * * *, any person may have access to the relevant papers in an action other than entries,

invoices and laboratory reports, which shall be available only to the attorney of record or a party to the action.

The United States Customs Court is an Article III Court of nationwide jurisdiction in customs matters and while its headquarters is officially in New York City, trials may be held throughout the United States [and hearings in some cases abroad] where the reception of evidence is necessary and appropriate. 28 U.S.C. §§ 251, 256; R. Sturm, *A Manual of Customs Law*, p. 12.

As stated by the Court of Customs and Patent Appeals in *United States* v. *Fairfield Gloves et al.*, 64 CCPA 126, C.A.D. 1194, 558 F. 2d 1023 (1977):

> * * * Far from unduly circumscribing litigants' rights, * * * [a rule of the Customs Court] recognizes the national jurisdiction of the Customs Court and attempts to place litigants far from the court's New York City headquarters on an equal footing with those nearby in the commencement of actions in the court.

It is manifest from legal authority, and this Court's rules and national jurisdiction that litigants and attorneys somewhat distant from New York City should not be penalized or prejudiced thereby but should be placed on an equal footing with those located nearby.

The observation of the defendant (Government) that Rule 14.5 provides for the payment of the fee by "the person at whose request photostatic copying of documents is performed" is not inconsistent with the relief here sought.

As Rule 14.3(b)(1) of this Court is explicit that "any person may have access to the relevant papers in an action other than entries, invoices and laboratory reports, which shall be available only to the attorney of record or a party to the action", the motion to have the Court papers (without entries, invoices, or laboratory reports), record, and exhibits in the instant case forwarded to the District Director of Customs at San Francisco, California for review, is sustained and it is further ordered that when said Court papers have served their purpose that they shall be returned to the Clerk of this Court forthwith. An order will be entered accordingly.

(C.R.D. 78–2)

SCM CORPORATION *v.* UNITED STATES (BROTHER INTERNATIONAL CORPORATION, PARTY-IN-INTEREST)

Antidumping—Jurisdiction

SCM, an American manufacturer, petitioned the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, as

amended, 19 U.S.C. § 1516(c), to impose antidumping duties on importations from Japan of portable electric typewriters. Pursuant to the Antidumping Act of 1921, as amended, 19 U.S.C. § 160 *et seq.*, the Secretary found that portable electric typewriters from Japan were being sold in the United States at less than their fair value. The International Trade Commission (ITC), however, determined that an American industry was not being and was not likely to be injured by the less than fair value sales of portable electric typewriters from Japan. Because the Antidumping Act of 1921, as amended, required both a finding by the Secretary of less than fair value sales, and an affirmative determination of injury by the ITC before antidumping duties could be assessed, the Secretary could not assess dumping duties.

Subsequently, SCM commenced an action in the federal district court seeking to review the negative injury determination of the ITC. The district court dismissed the action for lack of subject matter jurisdiction, holding that exclusive jurisdiction rested with the Customs Court under section 516. *SCM Corporation* v. *United States International Trade Commission et al.*, 404 F. Supp. 124 (D.D.C. 1975). On appeal, the court of appeals expressed doubt on the jurisdictional question presented, reversed the district court's judgment, and remanded the case with instructions to retain jurisdiction until SCM brought an action in the Customs Court enabling that court to determine whether it had subject matter jurisdiction over SCM's action.

SCM commenced an action in the Customs Court under section 516 seeking to review the negative injury determination of the ITC. SCM then moved to dismiss the action for lack of subject matter jurisdiction. The Customs Court held that it had jurisdiction to review a negative injury determination by the ITC in an American manufacturer's action brought pursuant to section 516(c) of the Tariff Act of 1930, as amended, and it therefore denied SCM's motion.

CUSTOMS COURT PRACTICE AND PROCEDURE

Where no applicable rule of the Customs Court provides the procedure by which plaintiffs may contest subject matter jurisdiction, the court will entertain and consider a plaintiff's motion to dismiss for lack of subject matter jurisdiction under Rule 1.1(b) of the Rules of the Customs Court.

STATUTORY CONSTRUCTION—LEGISLATIVE HISTORY

The pertinent legislative history of section 516 of the Tariff Act of 1930, as amended, shows that Congress intended the language of section 516(c) to extend review of the Secretary's failure to assess antidumping duties to include any factor or finding that would enter into the failure of the Secretary to assess antidumping duties.

SAME—PURPOSE OF CUSTOMS COURT

Congress established the United States Customs Court as the exclusive national tribunal for judicial review of civil litigation pertaining to customs matters in order to provide for uniformity and consistency in the interpretation and application of the customs

laws, and to fulfill the requirement of the United States Constitution, article I, § 8, that "all Duties, Imposts and Excises shall be uniform throughout the United States."

SAME

It is undisputed that an importer can seek review in the Customs Court of the Secretary's finding of sales at less than fair value or an affirmative injury determination of the ITC under the Antidumping Act of 1921, as amended. It is also undisputed that an American manufacturer can seek review in the Customs Court of the Secretary's finding, under the Antidumping Act, of no sales at less than fair value. Not to be able to utilize the same expertise of the Customs Court in an American manufacturer's action to review a negative injury determination of the ITC is unreasonable and anomalous and would permit potentially conflicting decisions by the district courts.

RULES OF STATUTORY CONSTRUCTION

Where one among alternative possible interpretations of a statute produces an unreasonable result, that interpretation should be rejected in favor of another which would produce a reasonable result.

JURISDICTION OF THE CUSTOMS COURT

Where no adequate relief may be obtained by the plaintiff in the Customs Court, it is said that jurisdiction will lie in the district courts. The mere fact that a more desirable remedy may be available in the district courts does not necessarily mean that the remedy in the Customs Court is inadequate.

Court No. 77-4-00553

[Motion denied.]

(Dated May 11, 1978)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Glenn E. Harris*, trial attorney), for the defendant.

Tanaka, Walders & Ritger (*H. William Tanaka* and *Lawrence R. Walders* of counsel) for the party-in-interest.

RE, Chief Judge: Plaintiff, SCM Corporation ("SCM"), an American manufacturer, by this action seeks to review under section 516(c) of the Tariff Act of 1930, as amended, the failure of the Secretary of the Treasury to assess dumping duties upon the importation from Japan of portable electric typewriters. It has moved under Rule 1.1(b) of the rules of this court for a determination whether this court has subject matter jurisdiction over this action.[1]

[1] Since the federal courts have only that jurisdiction conferred by the Constitution or Congress, it is fundamental that any party, even one who originally asserted jurisdiction, can protest the lack of subject matter jurisdiction. *See American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 71 S. Ct. 534 (1951); *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U.S. 379, 382, 4 S. Ct. 510 (1884); *Resnik* v. *LaPaz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961); 1 MOORE'S FEDERAL PRACTICE ¶0.60[4] (1977).

Rule 1.1(b) provides that "[w]here, in any proceeding or in any instance, there is no applicable rule of procedure, the judge or judges, before whom the action is pending, may prescribe the same." Although Rule 4.7(b)(2) provides defendants with the defense of lack of subject matter jurisdiction, there is no equivalent procedure by which *plaintiffs* may contest subject matter jurisdiction.[2] SCM has moved under Rule 1.1(b) because, while invoking the court's jurisdiction by bringing this action, it nevertheless deems it necessary to contest the jurisdiction of the court. Even though not specifically provided for in the rules of this court, SCM's motion will nonetheless be entertained and considered. *See Rubberset Co.* v. *United States*, 68 Cust. Ct. 370, C.R.D. 72-9, 342 F. Supp. 749 (1972). Since, by this motion, SCM contests the jurisdiction of the court, the motion will be treated as a motion to dismiss for lack of subject matter jurisdiction.

A brief history of this litigation, and the statutory scheme under which it arose, is necessary to understand the nature and purpose of plaintiff's motion.

This case arises under the Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.* (1970 & Supp. V 1975) ("Antidumping Act"), which was enacted to prevent actual threatened injury to a domestic industry resulting from sales of imported merchandise in the United States at prices lower than in the country of origin. *J.C. Penney Co.* v. *United States Department of Treasury*, 319 F. Supp. 1023, 1024 (S.D. N.Y. 1970), *aff'd*, 439 F. 2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Timken Co.* v. *Simon*, 539 F. 2d 221 (D.C. Cir. 1976). An affected American manufacturer, producer or wholesaler has the right to file a complaint with the Secretary of the Treasury ("Secretary") alleging that a class of foreign merchandise is being "dumped" in the United States. 19 U.S.C. § 1516 (Supp. V 1975). The Secretary is then required to determine whether the foreign merchandise is actually being sold at a lower price in this country than in the home market, i.e., whether the sales are at less than fair value (LTFV). Whenever the Secretary finds sales at LTFV, he advises the United States International Trade Commission ("ITC"), which has three months to determine "whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." If the ITC makes an affirmative injury determination, the Secretary must publish a notice of his and the ITC's determinations in the Federal Register. This publication constitutes the "dumping finding." The finding must include a description of the class or kind of merchandise to which it applies in such

[2] The Federal Rules of Civil Procedure provide that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3).

detail as may be necessary for the guidance of customs officers. 19 U.S.C. § 160(a).

When the "dumping finding" has been published, all unappraised merchandise described in the finding, entered or withdrawn from warehouse for consumption, not more than 120 days before the question was presented to the Secretary, is subject to special dumping duties. The amount of the dumping duties is the difference between the value of the merchandise in the foreign market, and the purchase or exporter's sales price, i.e., the "dumping margin." 19 U.S.C. § 161(a). Dumping duties will not necessarily be assessed merely because the imported merchandise has been the subject of a dumping finding. Customs officials will assess dumping duties on an entry by entry basis, and only if they find a "dumping margin."

If the Secretary finds no LTFV sales, or if the ITC makes a negative injury determination, no dumping finding can be published and no dumping duties can be assessed. For a brief summary of the provisions of the Antidumping Act, see *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 79 Cust. Ct. 163, C.R.D. 77–6, 435 F. Supp. 1224 (1977), which denied plaintiff's motion for assignment of this action to a three-judge panel.

Under the Antidumping Act, dumping duties can be assessed only against *unappraised* merchandise. Congress, therefore, provided the provisional remedy known as "withholding of appraisement" to prevent importations during the pendency of the dumping investigation from being appraised by customs, and thus escaping subsequent imposition of dumping duties. Whenever the Secretary has reason to believe or suspect that a class of merchandise, as to which a finding has not been made public, is being sold at LTFV, i.e., being "dumped," he shall publish in the Federal Register what is called a withholding notice. An appraisement is withheld until further order, or until a dumping finding has been published. 19 U.S.C. § 160(b).

Pursuant to the Antidumping Act, SCM filed a complaint with the Secretary on February 14, 1974, alleging that portable electric typewriters from Japan were being "dumped" in the United States. Notice of pendency of a dumping investigation was published on March 20, 1974. Notice providing for withholding of appraisement followed on December 20, 1974. On March 20, 1975, Assistant Secretary of the Treasury Macdonald published a notice that sales of portable electric typewriters from Japan were being or were likely to be made at LTFV. 40 Fed. Reg. 12685 (1975). The ITC, advised of the Secretary's determination, held hearings in May of 1975, and on June 19, 1975 by a 3–2 vote, one Commissioner abstaining, rendered a negative determination of injury. The negative injury determination was published on June 26, 1975. 40 Fed. Reg. 27079 (1975).

As a result of the negative injury determination by the ITC, the Secretary of the Treasury had no authority to publish a dumping finding or to assess dumping duties. Accordingly, he authorized the appraisement of the typewriters which were subject to withholding of appraisement pending the outcome of the dumping investigation.

SCM sought to contest the negative injury determination of the ITC. It commenced an action in the United States District Court for the District of Columbia seeking to set aside the negative injury determination of the ITC, and requested preliminary injunctive relief. *SCM Corporation* v. *United States International Trade Commission et al.*, 404 F. Supp. 124 (D.D.C. 1975). The jurisdictional basis for the action was 28 U.S.C. § 1340 (1970), which provides that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court." The jurisdiction of the United States Customs Court over actions by American manufacturers is found in 28 U.S.C. § 1582(b) (1970), which provides that "[t]he Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended." [3]

[3] Section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (Supp. V 1975), reads as follows:

"(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as 'countervailing duties'), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as 'antidumping duties'), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties or antidumping duties should be assessed.

(b) If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

(c) If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publica-

(Continued)

These statutes make it clear that if a civil action is within the exclusive jurisdiction of the United States Customs Court, it cannot be brought in the district courts. *E.g.*, *Consumers Union of United States, Inc.* v. *Committee for the Implementation of Textile Agreements*, 561 F. 2d 872 (D.C. Cir. 1977), *cert denied*, No. 77-[illegible]5 (March 20, 1978); *Fritz* v. *United States*, 535 F. 2d 1192 (9th Cir. 1976). Since the defendants in the district court maintained that the United States Customs Court had jurisdiction under the provisions of section 516, it moved to dismiss SCM's action for lack of subject matter jurisdiction. The district court held that since SCM could bring its action pursuant to section 516, it was within the exclusive jurisdiction of the United States Customs Court. In its decision, the district court also stated that the amendments to section 516 "provided in the Trade Act of 1974 reinforce the conclusion that Congress did not mean to deprive the Customs Court of its exclusive jurisdiction over customs matters." *SCM Corporation*, 404 F. Supp at 130. Accordingly, the district court granted defendant's motion and dismissed the action. *Id.* at 132.

(Continued)

tion of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or *failure to assess countervailing duties or antidumping duties upon, such merchandise* in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated. [Emphasis added.]

(d) Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

(e) Notwithstanding the filing of an action pursuant to section 2632 of Title 28, merchandise of the character covered by the published decision of the Secretary (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(f) The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.

(g) If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

(h) Regulations shall be prescribed by the Secretary to implement the procedures required under this section. (As amended Jan. 3, 1975, Pub. L. 93-618, title III, §§ 321(f)(1), 331(b), 88 Stat. 2048, 2052.)"

On appeal, the United States Court of Appeals for the District of Columbia Circuit expressed doubt on the jurisdictional question presented and stated:

> "SCM has raised what are far from frivolous doubts concerning its ability to obtain review in the Customs Court pursuant to section 516(c). On the other hand, [the defendants] have urged upon us what appear to be quite possible constructions of the applicable statutes and legislative history." *SCM Corporation* v. *United States International Trade Commission et al.*, 549 F. 2d 812, 821 (D.C. Cir. 1977).

Hence, the court of appeals reversed the judgment dismissing SCM's action for lack of subject matter jurisdiction, and remanded the case to the district court. The remand contained the instruction that the district court retain jurisdiction until SCM had brought an action in the United States Customs Court to enable the Customs Court to determine whether it had jurisdiction to review a negative injury determination of the ITC in an American manufacturer's action brought under section 516.

Subsequently, SCM commenced an action in this court pursuant to section 516, and made the present motion to determine the court's subject matter jurisdiction. As indicated at the outset, the motion will be treated as a motion to dismiss for lack of subject matter jurisdiction. Thus, the question presented is whether under section 516 this court has jurisdiction to review a negative injury determination of the ITC in an action brought by an American manufacturer.

There is no doubt that "agency action" is judicially reviewable, whether it is deemed affirmative or negative. *See City of Chicago* v. *United States*, 396 U.S. 162, 166–67, 90 S. Ct. 309 (1969); *Dunlop, Secretary of Labor* v. *Bachowski*, 421 U.S. 560, 566, 95 S. Ct. 1851 (1975); *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961) and authorities cited. The issue, therefore, is not whether judicial review is available, but rather, the appropriate forum in which it may be sought.

SCM points out that there is no specific statutory provision that expressly grants jurisdiction to this court to review a negative injury determination by the ITC in an American manufacturer's action. It claims that there is no jurisdiction in this court since section 516(c) only provides for review to contest the Secretary's failure to assess antidumping duties.

SCM states that section 516(d) *expressly* provides for jurisdiction in this court to review *LTFV* determinations by the Secretary. Because this review was *expressly* provided for, while no express provision was made to review injury determinations by the ITC, SCM claims that "failure to assess antidumping duties" cannot

include review of an ITC injury determination. According to SCM, if "failure to assess antidumping duties" were to be read to include injury determinations by the ITC, it would also include review of the Secretary's LTFV determinations, and that interpretation would make the specific provision for review of LTFV determinations unnecessary.

SCM believes that the legislative history supports its view that Congress never intended section 516 to provide review of negative injury determinations of the ITC. It also points to several prior judicial decisions which recognize that if there is no adequate remedy in this court, jurisdiction will be exercised by the district courts. SCM asserts that this principle is applicable here since this court is unable to provide an adequate remedy.

Defendant[4] maintains that SCM's demand is overly exacting in its requirement or expectation that the statute explicitly recite that negative injury determinations by the ITC are reviewable under section 516. It indicates that no statute *precludes* review in this court. According to the defendant, the "failure to assess" language of section 516(c) includes all preliminary determinations which enter into the Secretary's failure to assess dumping duties. The defendant emphasizes that only this interpretation fully supports and fosters the well-known national policy of providing for a uniform scheme of customs law through exclusive jurisdiction in this court. It also maintains that SCM is in error in asserting that this court cannot provide an adequate remedy.

In determining whether section 516 provides for review of a negative injury determination of the ITC, the court must first examine the actual language of the statute. Section 516 provides American manufacturers, producers and wholesalers with the procedure to contest the appraised value and classification of merchandise, the applicable rate of duty, and the failure to assess countervailing or antidumping duties.

If an American manufacturer believes that antidumping duties should be assessed, section 516(a) authorizes the manufacturer to file a petition with the Secretary setting forth a description of the merchandise, the duty it feels should properly be assessed, and the reasons for its belief that antidumping duties should be assessed. 19 U.S.C. § 1516(a). If the Secretary agrees with the American manufacturer, he complies with the procedure prescribed in the Antidumping Act, 19 U.S.C. § 1516(b).

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[4] Under 19 U.S.C. §1516(f) (note 3 *supra*), the consignee or his agent has the right to appear and be heard as a party in interest in an action brought by an American manufacturer pursuant to section 516. In the present action, Brother International Corporation has exercised this right to appear and be heard as a party in interest. Because the arguments of the defendant and the party in interest are substantially similar, the term "defendant" includes the arguments of both, unless stated otherwise.

If, however, the Secretary determines that the appraisement or duty assessment is correct, or that no antidumping duties should be assessed, section 516(c) expressly authorizes and prescribes the procedures for the American manufacturer to challenge the Secretary's decision. The Secretary must give notice of the first liquidation of the merchandise in question at a port or ports specified by the American manufacturer. Section 516(c) also expressly authorizes the manufacturer to contest the "failure to assess . . . antidumping duties upon, such merchandise in the liquidation of one such entry at such port [as designated by the American manufacturer]." 19 U.S.C. § 1516(c).

If the Secretary, in the course of his antidumping investigation, makes a determination of no sales at LTFV, section 516(d) expressly permits an American manufacturer directly to contest that *particular* determination without following the requirements of section 516(c).

SCM suggests that by enacting 516(d), Congress indicated it could provide explicitly for review of antidumping determinations. Hence, by failing to enact a specific provision for review of ITC determinations parallel to section 516(d), SCM asserts that Congress intended to preclude review. The court does not agree that Congress, by its failure explicitly to provide for review of ITC injury determinations in section 516(d), intended to preclude judicial review. The question presented pertains to the intent of Congress as gleaned from the entire statutory scheme of section 516.

The language of section 516(c) that permits an American manufacturer to contest "the failure to assess . . . antidumping duties" contains no limitations, and is sufficient to include a challenge to the preliminary determinations that go into a decision to assess, or not to assess, dumping duties. Admittedly, there is no language in section 516, or elsewhere that would preclude review of ITC determinations under section 516. SCM nonetheless asserts that the purpose of its action is not the assessment of dumping duties, but the cessation of injurious "dumping." Therefore, it asserts that, under the provisions of section 516(c), it cannot obtain review of the failure to assess dumping duties.

To achieve its objective, SCM claims that dumping duties need not be assessed. It feels that the publication of a dumping finding, which would authorize the imposition of dumping duties when a margin of dumping exists, would remove any incentive to "dump." The mere publication of a dumping finding, however, cannot provide the relief SCM seeks. Only the imposition of dumping duties, if warranted, will end dumping. No matter how characterized or phrased by SCM, what is ultimately at issue is the appraised value of the imported merchandise.

The present version of section 516 was enacted as part of the Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 2052 (1975) (now codified as 19 U.S.C. § 1516). Under the prior scheme of section 516, an American manufacturer was afforded the right to contest in this court valuation determinations by the Secretary. Tariff Act of 1930, ch. 497, Title IV, § 516, 46 Stat. 735 (1930). Under that provision, it was held that an American manufacturer could contest the Secretary's determination of no sales at LTFV in an antidumping investigation. *North American Cement Corp.* v. *Anderson*, 284 F. 2d 591 (D.C. Cir. 1960). In another case, however, a decision of the Court of Customs and Patent Appeals questioned the correctness of this determination. In *Hammond Lead Products, Inc.* v. *United States*, 63 Cust. Ct. 316, C.D. 3915 (1969), this court had held that, under section 516, it had jurisdiction to review a negative countervailing duty determination by the Secretary. The Court of Customs and Patent Appeals, however, reversed and held that a countervailing duty was a penalty and therefore not within the scope of section 516. *United States* v. *Hammond Lead Products, Inc.* 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971).

The 1974 Trade Act amendments were designed to nullify the holding of the *Hammond Lead Products* case, and specifically authorized review of negative countervailing duty determinations within section 516. H.R. Rep. No. 93–571, 93d Cong., 1st Sess. 76 (1973). By providing for judicial review, Congress intended "to assure effective protection under the countervailing duty laws to American producers." S. Rep. No. 93–1298, 93d Cong., 2d Sess. 185 (1974). As part of the wide-ranging reforms effected by the Trade Act of 1974, Congress amended the Antidumping Act and the antidumping provisions of section 516. The House did not include a specific provision for judicial review of negative antidumping determinations in its version of the bill because no judicial decision seemed to have made it necessary. Indeed, as indicated by the following statements from the House Report, it felt that judicial review under section 516 was already available to an American manufacturer:

> "It will be noted in the following section that section 516 of the Tariff Act of 1930 is amended to specifically permit judicial review of negative countervailing duty determinations. The committee has been informed by letter from the Secretary of the Treasury that domestic producers do have the right of judicial review in antidumping cases. *The committee wishes to make it clear that the absence of amendments to section 516 with respect to antidumping cases should not be considered to mean that negative antidumping findings are not subject to review.* The committee is in agreement with the letter." H.R. Rep. No. 93–571, at 73 (Emphasis added.)

The letter referred to in the House Report based its conclusion that judicial review of negative antidumping determinations was already available in the holding of the *North American Cement* decision. In the opinion of the Secretary of the Treasury, *Hammond Lead Products* did nothing to cast doubt upon the reviewability of negative antidumping determinations since that decision was predicated on the conclusion that *countervailing duties* were penal in nature, and the Secretary believed that dumping duties were not penal but ordinary duties.[5]

As may be gleaned from the following committee report, the Senate Finance Committee, although with some doubt, generally agreed with the opinion expressed in the House Report:

> "*Equal Judicial Review Rights for Domestic Producers.*— . . . The House report makes references to an informal opinion of the Treasury Department which asserts that existing law provides for judicial review of negative antidumping decisions on the part of the U.S. manufacturers, producers, or wholesalers. *The Committee generally agrees with this opinion.* However, it is the view of the Committee that since some question remains as to the ability of American manufacturers, producers, and wholesalers to obtain judicial review of negative antidumping determinations under section 516 of the Tariff Act of 1930, the law ought to be explicit on this point. The Committee believes it essential that domestic producers have the right to judicial review of negative price discrimination (LTFV) determinations, just as foreign producers and importers have the right to obtain judicial review of positive price discrimination (LTFV) determinations.
>
> The Committee, therefore, added [a] new subsection . . . to provide *explicitly* for judicial review of negative antidumping determinations made by the Secretary of the Treasury. . . ." S. Rep. No. 93–1298, 93d Cong., 2d Sess. 178, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7314–15. (Emphasis added in part.)

The new subsection added by the Senate is embodied in section 516(d), and, in antidumping cases, provides for judicial review of determinations by the Secretary that there have been no sales at LTFV. It does not explicitly provide for review of negative injury determinations by the ITC, or failure of the Secretary to assess dumping duties because no margin of dumping was found.

When the bill reached the full Senate, several amendments were made before passage. The present language of section 516(c), providing for review of the Secretary's failure to assess antidumping duties, was added by Amendment No. 2051. The following statement by Senator Long, who introduced this amendment, is particularly pertinent:

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[5] The letter is contained in full in the opinion of the court of appeals in *SCM Corporation* v. *United States International Trade Commission et al.*, 549 F. 2d 812, 816 n. 9 (D.C. Cir. 1977). *See* plaintiff's exhibit 7.

"Mr. President, *this amendment permits a manufacturer to review on an identical basis* negative countervailing duty and antidumping determinations of the Secretary of the Treasury. It is more or less a *conforming amendment* to carry out the intent of the bill. [Emphasis added]." 120 CONG. REC. 39839 (1974). *See* H.R. 10710, 93d Cong., 2d Sess. § 331(b) (Amendment Nos. 364–67) (Dec. 13, 1974) (Approved Jan. 3, 1975).

Surely, there is no indication that Congress intended to *preclude* review of ITC injury determinations under section 516. The Senate Report basically agreed with the opinion of the House that the existing law provided for judicial review of negative antidumping determinations. The Finance Committee, however, considered it essential that American manufacturers have the right to judicial review of negative LTFV determinations by the Secretary, and thus drafted what is now section 516(d) explicitly to provide for judicial review. It made no provision for judicial review of *other* aspects of negative antidumping determinations. S. Rep. No. 93–1298. Amendment No. 2051, which added review of failure to assess antidumping duties to section 516(c), was added to *conform* the review of antidumping duties with the provisions for review of countervailing duties. This legislative intent is shown not only by the remarks of Senator Long, but also by the classification given the amendment by the Conference Committee. The House agreed to the amendment without comment as a conforming amendment. Conf. Rep. No. 93–1644, 93d Cong., 2d Sess. 1, 21, *joint explanatory statement of the committee of conference, reprinted in* [1974] U. S. CODE CONG. & AD. NEWS 7367.

Before countervailing duties may be assessed, the Secretary must determine whether a bounty or grant has been bestowed on the imported merchandise by a foreign government. Countervailing duty determinations are usually made by the Secretary without assistance from the ITC. However, where the merchandise is normally duty-free, an affirmative injury determination by the ITC is required before the Secretary may assess a countervailing duty. 19 U.S.C. §1303(b) (Supp. V 1975). In this instance, the requirements to impose countervailing duties are closely parallel to those required to impose dumping duties. It has been observed that the countervailing duty law and the antidumping statute are "opposite sides of the same coin." King, *Countervailing Duties—An Old Remedy With New Appeal*, 24 BUS. LAW. 1179, 1181 (1969).

The language of section 516(c) is identical for countervailing duty and antidumping duty cases. If an American manufacturer is dissatisfied with the decision of the Secretary, it may contest the "failure to assess countervailing duties or antidumping duties upon, such merchandise . . . ." 19 U.S.C. § 1516(c).

It is clear that Congress intended to extend review under section 516(c) to encompass *all* issues embodied in the failure to assess countervailing duties. The House Report expressly stated that the amendment to section 516(c) would "provide for judicial review of negative countervailing duty determinations by the Secretary of the Treasury." H.R. Rep. No. 93-571, at 76. SCM, however, argues that the phrase "determinations by the Secretary," as used in the House Report, and by Senator Long in introducing Amendment No. 2051, shows a congressional intent to limit review under section 516, in both antidumping and countervailing duty cases, to those determinations actually made by the Secretary. SCM contends that this phrase shows that Congress did not intend review under section 516 to encompass decisions underlying determinations made by the Secretary. The House Report, however, used the phrase in the very section where it discussed the requirement that an injury determination be made by the ITC before the Secretary could assess countervailing duties on otherwise nondutiable merchandise. Therefore, the phrase "determinations by the Secretary," as used in the legislative history, refers to *any* factor or finding that would enter into the failure of the Secretary to assess countervailing or antidumping duties. It was not intended to be limited solely to determinations actually made by the Secretary.

Section 516(c) does, therefore, provide for review of a negative injury determination by the ITC, when necessary, in a countervailing duty action brought by an American manufacturer. Compliance with the stated intent of Congress, to provide review of negative countervailing duty determinations and negative antidumping duty determinations "*on an identical basis*" requires that section 516(c) be interpreted to afford review of all issues in antidumping cases. This should include review of negative injury determinations of the ITC, as well as all issues in countervailing duty cases. Any other interpretation would do violence to the stated intention to attain in dumping cases "conformity" and "identical" treatment with countervailing duty cases.

Section 516(d) expressly provides for judicial review of a determination by the Secretary that a bounty or grant has not been paid or bestowed in countervailing duty cases (19 U.S.C. § 1516(d)(2)),[6] as well as review of the Secretary's determination that there have been no LTFV sales in antidumping cases. 19 U.S.C. § 1516(d)(1). SCM claims that section 516(d) indicates an intent to preclude review of ITC determinations under section 516(c) on the basis that Congress did not consider a challenge of the Secretary's negative LTFV determination to be a challenge of the decision not to assess dumping duties. The court does not agree with plaintiff's contention because the

[6] This provision was added to subsection (d) as part of Amendment No. 2051. 120 CONG. REC. 39839 (1974).

expressed intention of Congress was to authorize review of negative antidumping determinations and negative countervailing duty determinations on an identical basis. 120 CONG. REC. 39839 (1974) (remarks of Sen. Long). The House Report manifests an intent that section 516(c) should provide review of *all* issues embodied in the failure to assess countervailing duties. The provisions of section 516(d) merely provide a more expeditious form of review of one specific issue in antidumping cases, and for one specific issue in countervailing duty cases. Nowhere is there any indication that this additional section was intended to limit the broad general language of section 516(c). *See* S. Rep. No. 93–1298 and Conf. Rep. No. 93–1644, at 44.

The conclusion that Congress intended section 516 to include review of a negative injury determination by the ITC in an action brought by an American manufacturer is fully supported by the expressed intention of the amendments to the Trade Act of 1974. Senator Long stated that the purpose of Amendment No. 2051, which added antidumping review to section 516, was "to carry out the intent of the bill." 120 CONG. REC. 39839 (1974). It is clear that one of the purposes of trade act amendments was to provide American manufacturers with judicial review equal to that available to importers which entitled them to contest the actual assessment of countervailing or antidumping duties. *See* H.R. Rep. No. 93–571, at 76; S. Rep. No. 93–1298. This court and the Court of Customs and Patent Appeals have regularly exercised jurisdiction in actions brought by American importers to contest affirmative injury determinations by the ITC.[7] *See, e.g.*, *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *City Lumber Co.* v. *United States*, 59 CCPA 89, C.A.D. 1045, 457 F. 2d 991 (1972); and *Ellis K. Orlowitz Co.* v. *United States*, 50 CCPA 36, C.A.D. 816 (1963).

The intent to provide judicial review of these questions, "equally" to American manufacturers and importers, is in harmony with the well recognized national policy that this court was established by Congress to provide a complete system of justice in the administration of customs law. It is also generally acknowledged that "questions involving the validity of official action in the imposition and collection of duties are properly cognizable before [the Customs Court] to the exclusion of other courts." *David L. Moss Co.* v. *United States*, 26 CCPA 381, 383, C.A.D. 45, 103 F. 2d 395 (1939).

Many cases may be cited to show that the courts have judicially noticed the congressional intention that civil litigation pertaining to customs matters should be conducted exclusively in the Customs

[7] The ITC, formerly known as the United States Tariff Commission, was established by the Tariff Act of 1930, ch. 497, § 330, 46 Stat. 696 (1930). Its name was changed to the United States International Trade Commission by the Trade Act of 1974, Pub. L. No. 93-618, § 171, 88 Stat. 2009 (1975).

Court. For example, the United States Court of Appeals for the Ninth Circuit, referring to the exclusive jurisdiction of the Customs Court, recently stated:

> "Even when other, broadly-worded statutes seem to confer concurrent jurisdiction on the district courts, the exclusivity of Customs Court jurisdiction reflects a policy of paramount importance which overrides the literal effect of such statutes . . .." *Fritz* v. *United States*, 535 F. 2d 1192, 1195 (9th Cir. 1976).

See also: David L. Moss Co. v. *United States, supra; J. C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (2d Cir. 1939); *Cottman* v. *Dailey*, 94 F. 2d 85 (4th Cir. 1938).

In the *North American Cement* case, 284 F. 2d 591 (1960), the United States Court of Appeals for the District of Columbia Circuit also acknowledged the exclusive jurisdiction of the Customs Court. In affirming the dismissal by the district court of the American manufacturer's complaint for lack of subject matter jurisdiction, the circuit court reviewed several of its previous holdings on this question:

> "In *Morgantown Glassware Guild* v. *Humphrey*, we read 28 U.S.C. § 1583 [now 1582] as providing without limitation that ' "The Customs Court shall have exclusive jurisdiction to review on protest the * * * rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *." ' 98 U.S. App. D.C. 375, 376, 236 F. 2d 670, 671 [1956]. In *Boston Wool Trade Ass'n* v. *Snyder*, we said: 'It is clear that the controversy concerns the duty to be imposed upon certain imports. As such, it is within the exclusive jurisdiction of the Court of Customs and Patent Appeals.' 82 U.S. App. D.C. 144, 145, 161 F. 2d 648, 649 [1947]." 284 F. 2d at 592.

The same national policy led to the establishment of the Court of Customs Appeals, the predecessor of the present United States Court of Customs and Patent Appeals. *See, e.g.*, 44 CONG. REC. 4189, 4190, 4195–96, 4199, 4201–02, 4208, 4213–14, 4215, 4697 (1909).

Congress established the Customs Court to provide uniformity and consistency in the interpretation and application of the customs laws. *J. C. Penney Co.*, 439 F. 2d at 65–66. By the recent amendments of the Trade Act of 1974, Congress further demonstrated its intention that the Customs Court should provide an exclusive and uniform interpretation of customs laws by superseding the *Hammond Lead Products* case, which had held that negative countervailing duty determinations were not reviewable in this court. *See* H.R. Rep. No. 93–571, at 76.

Questions of uniform national application must be resolved by an interpretation of the governing statute that effectuates the intended

purpose of the Congress. *See NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851 (1944); *Rogers* v. *Missouri Pacific Ry.*, 352 U.S. 500, 77 S. Ct. 443 (1957); *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912 (1957). In the *Hearst Publications* case, it was contended that newsboys were not required to bargain because they were not within the meaning of "employees" under the National Labor Relations Act. The Supreme Court held that the term "employees," as used under that Act, was to be interpreted in accordance with the intended purpose of the statute, and not by resort to the common law relation of "master-servant." The national purpose of the Act could only be achieved by a broadened definition of the word "employees" since, clearly, Congress did not legislate "solutions only partially effective." 322 U.S. at 120–32. Similarly, the language of section 516(c) must be interpreted to effectuate the congressional intent that the customs laws of the nation be interpreted and applied with uniformity and consistency.

This intent, to make the United States Customs Court the exclusive tribunal for the interpretation and application of the customs laws, is particularly significant because it finds its genesis not only in congressional enactments, but also in the constitutional mandate that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, §8. To accept SCM's contention that this court is without jurisdiction to review injury determinations by the ITC under section 516 does violence to the constitutional requirement of uniformity, and the legislative history surrounding the recent amendments to section 516.

It is not disputed that an importer can seek review in this court of the assessment of antidumping duties, including all determinations that underlie the assessment. An importer can challenge the Secretary's finding of sales at LTFV, the ITC's affirmative determination of injury, the determination by the Customs Service that the merchandise is of the class or kind subject to dumping duties, and that a dumping margin exists. It is also not disputed that an American manufacturer can seek review in this court of the Secretary's determination of no sales at LTFV, the determination by the Customs Service that the merchandise is not of the class or kind subject to dumping duties, and the Customs Service's determination that no dumping margin exists. In short, it is undisputed that all the issues that can be raised by an importer in an antidumping action in this court can also be raised in a similar action by an American manufacturer, with the sole exception of negative injury determinations by the ITC.

SCM seeks a determination whether jurisdiction over this particular antidumping question is in this court or in the district courts. To

agree with the contention that jurisdiction exists in the district courts is to permit potentially conflicting determinations of the same issues by the various district courts. It is precisely this possibility of differing interpretations that Congress sought to avoid by establishing the United States Customs Court.

It is clear that this court has jurisdiction, and may apply its expertise in customs and tariff matters to ITC determinations in actions brought by importers. To be unable to utilize this same expertise in the same type of questions only because the action is brought by an American manufacturer would be unreasonable and anomalous. It is inconceivable that Congress could have intended such a result. Chief Justice Marshall, writing of the "well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole," added that: "It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). "It has been called the golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 45.12, at 37 (4th ed. 1973). *See Commissioner* v. *Brown*, 380 U.S. 563 (1965); *Lange* v. *United States*, 443 F. 2d 720 (D.C. Cir. 1971); *Cohn & Rosenberger* v. *United States*, 4 CCPA 378, T.D. 33536 (1913).

The whole purpose of the legislative effort underlying the 1974 Trade Act amendments was to give identity of rights to importers and American manufacturers. Any other interpretation would attribute to Congress the permitting of an intolerable anomaly, vitiating its expressed intention of equality for both classes. As stated in the dissenting appellate opinion of *Hammond Lead Products*, which now represents the law:

> "If an importer may protest the decision of the Secretary of the Treasury finding a bounty or grant, why shouldn't an American manufacturer be permitted to protest the decision of the Secretary of the Treasury finding no bounty or grant? . . . They are . . . protesting a decision of the Secretary of the Treasury as they are clearly permitted to do under either section 514 or 516, depending on whether it is a protest by an importer or by an American manufacturer." 58 CCPA at 144.

This fortifies the concept that what is involved in antidumping and countervailing cases, whether the complaint is that of an importer or an American manufacturer, is the classification and/or the rate of duty of imported merchandise.

There is no doubt that it was the intent of Congress to provide judicial review to American manufacturers under section 516. The interpretation that judicial review of negative injury determinations by the ITC is available in the United States Customs Court under section 516 fulfills the intent of Congress, and effectuates the national policy of fostering expertise and uniformity in the interpretation and application of the customs laws.

SCM nonetheless contends that even though the policy of uniformity in the interpretation and application of the customs laws requires exclusive jurisdiction to be vested in the United States Customs Court, this action nevertheless comes within the recognized judicial exception that if adequate relief cannot be obtained in this court, jurisdiction lies in the district courts. *J.C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d 63 (2d Cir. 1971), *cert. denied* 404 U.S. 869 (1971); *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971); *Timken Co.* v. *Simon*, 539 F. 2d 221 (D.C. Cir. 1976).

Citing the *Timken* case, SCM argues that if it proceeded under section 516, it could not obtain an adequate remedy. Since section 516(c) provides for the challenge to the nonassessment of dumping duties on only one entry, SCM claims that there is no assurance that by following section 516(c) it can obtain review of the ITC's negative injury determination. It suggests that by providing review procedures in section 516(d), for the review of the Secretary's LTFV determinations that are different from the provisions of section 516 (c), Congress indicated that it would be too burdensome to follow section 516(c) procedures in challenging negative injury determinations.

In the *Timken Co.* case, the court indicated that section 516(c)—

> "is designed to enable American manufacturers to challenge substantive decisions by the Secretary with respect to the need for or the amount of antidumping duties. The section is structured to enable the petitioning manufacturer to challenge one entry per port, and *to use that entry as a vehicle to obtain Customs Court review of the merits of the Secretary's determination.*" (*Emphasis added.*) *Timken Co.*, 539 F. 2d at 225–26.

The judicial exception to the exclusive jurisdiction of the Customs Court, which vests jurisdiction with the district courts when this court cannot grant an adequate remedy, finds expression in the *J. C. Penney Co.* case. In that case, an American importer sought declaratory and injunctive relief to prevent the Treasury Department from conducting an investigation under the Antidumping Act to determine whether there were LTFV sales of the importer's products. The court observed that—

> "[i]t is further urged that even acknowledging that generally exclusive jurisdiction over constitutional issues is vested in the

> Customs Court, there nevertheless exists a recognized judicial exception to this statutory rule when no adequate relief may be obtained in that court. We do not dispute the existence of such an exception. See, e.g., *Waite* v. *Macy*, 246 U.S. 606, 38 S. Ct. 395, 62 L. Ed. 892 (1918)." *J. C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d at 68.

Although recognizing the existence of the exception to the "generally exclusive jurisdiction" of the Customs Court, the court held that the exception was inapplicable. In effectuating the intent of Congress, and the "broad national policy" which prompted the grant of exclusive jurisdiction to the Customs Court, the court noted that the "proper administration of the customs laws requires a complete, integral, smooth-functioning system of customs law justice." 439 F. 2d at 66. Although the Customs Court lacked the equitable power to grant the relief plaintiff sought, the remedy that the Customs Court could grant was nevertheless deemed adequate. The court stated:

> "Thus the only remedy available to Penney [in the Customs Court] is the obtaining of refunds of special dumping duties which may have been improperly assessed and paid. Though it may be true that the ordering of a hearing would be a more desirable form of relief from Penney's point of view than the obtaining of refunds, the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate. We conclude that there is, in fact, an adequate remedy available to Penney in the Customs Court." 439 F. 2d at 68.

In *Waite* v. *Macy*, 246 U.S. 606 (1918), cited by the court in the *J.C. Penney Co.* case, the issue was not whether the plaintiff could obtain an adequate remedy within the statutory jurisdiction of the Secretary of the Treasury and the Board of General Appraisers. Rather, the question presented was whether the Secretary of the Treasury and the board had exceeded their jurisdiction by applying criteria not enumerated in the statute. In that case, pursuant to a regulation of the Secretary of the Treasury, the board had excluded certain imported tea on the ground that it contained added coloring. The pertinent statute restricted the board's power to determinations on the purity, quality or fitness for consumption. The Supreme Court held that the board exceeded its statutory jurisdiction in applying criteria not spelled out in the statute. Mr. Justice Holmes, writing for the Court, stated:

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption." 246 U.S. at 608–09.

The Court of Customs and Patent Appeals has acknowledged that the district courts may have jurisdiction over customs cases where

the plaintiff has no remedy in the Customs Court. In the *Hammond Lead Products* case, an American manufacturer claimed that section 516, prior to the Trade Act of 1974 amendments, provided for judicial review in the Customs Court of the Secretary's failure to assess countervailing duties. Although the Court of Customs and Patent Appeals held that section 516 did not confer jurisdiction on the Customs Court to review negative countervailing duty determinations of the Secretary in actions brought by American manufacturers, the following statements of the appellate court are nevertheless pertinent to the question of an available remedy in the Customs Court:

> "The Second Circuit, in *J. C. Penney Company Inc.* v. *United States* [citation omitted], has considered the new statute and reaffirmed holdings under the old, that the regular Federal courts will not interfere in customs cases reviewable in the Customs Court, because an importer desires to tailor a remedy more satisfactory to him than the Customs Court affords. A case of an American Manufacturer having no remedy at all in the Customs Court is greatly different. . . . [I]t could be the regular [Federal] courts would take jurisdiction in cases outside [the scope of the Customs Court's jurisdiction]." *Hammond Lead Products, Inc.*, 58 CCPA at 140–41.

SCM cites *Timken Co.* v. *Simon*, 539 F. 2d 221 (D.C. Cir. 1976) in support of its contention that it does not have an adequate remedy through section 516. In the *Timken Co.* case, the plaintiff, an American manufacturer, pursuant to section 516, submitted a complaint that tapered roller bearings from Japan were being "dumped" in the United States. After investigating Timken's charges, the Secretary, on June 5, 1974, pursuant to 19 U.S.C. § 160(b), published a notice withholding appraisement, and on September 6, 1974, published a determination of LTFV sales. On January 23, 1975, the ITC rendered an affirmative injury determination. At this point the Secretary would normally publish a "dumping finding," and all unappraised tapered roller bearings from Japan entered, or withdrawn from warehouse, for consumption not more than 120 days before October 31, 1973 (the date the Secretary received Timken's complaint) would be subject to the imposition of dumping duties. The Secretary, however, did not follow this course. Instead, he directed the customs officials to appraise the merchandise covered by the withholding notice, thus removing those entries from possible imposition of dumping duties.

The United States Court of Appeals for the District of Columbia Circuit affirmed a finding of jurisdiction in the district court on the ground that section 516 could not provide review of Timken's complaint that the Secretary acted beyond his authority in revoking the withholding of appraisement notice, and ordering appraisement of the

merchandise prior to publication of a dumping finding. The court held that section 516 provided review of substantive decisions by the Secretary with respect to antidumping duties through the review of certain entries occurring *after* the date of the Secretary's adverse ruling. (*See* section 516(c), *supra* note 3.) The question presented by Timken's complaint was beyond the scope of section 516 because it concerned entries made before the date of the Secretary's adverse determination. The court, therefore, concluded that "[s]ince Timken has *no remedy* pursuant to section 516 in the Customs Court, we decline to hold that the district court lacked jurisdiction over this action." *Timken Co.*, 539 F. 2d at 226, n. 7 (emphasis in original).

Thus, although the *J. C. Penney Co.* case recognized that the exception to the generally exclusive jurisdiction of the Customs Court vests jurisdiction in the district courts when this court cannot grant an adequate remedy, the court held that an adequate remedy was available in the Customs Court. The *Hammond Lead Products* and *Timken Co.* cases held that the Customs Court could grant *no remedy* because the statutory scope of its jurisdiction did not extend to the respective issues presented in those cases.

The United States Court of Appeals for the Second Circuit recently considered this jurisdictional question in a case that came within the exception to the exclusive jurisdiction of the Customs Court. In *Sneaker Circus, Inc., et al.* v. *Carter et al.*, 566 F. 2d 396 (2d Cir. 1977), the plaintiff importers sought to attack the validity of certain trade agreements which limited the quantity of footwear exported from the Republic of Korea and the Republic of China to the United States. No footwear could be exported to the United States unless the exporter obtained a visa from his government approving the exportation.

To obtain judicial review in the Customs Court, pursuant to section 514, Tariff Act of 1930, as amended, the plaintiffs must have protested the denial of entry of footwear exported from the Republic of China and the Republic of Korea by a specific administrative ruling made at a United States port of entry. Only when that particular protest had been denied in accordance with the provisions of section 515, Tariff Act of 1930, as amended, could the jurisdiction of the Customs Court be invoked. However, without obtaining a visa from the exporting country, it was doubtful whether the plaintiffs would ever be able to export footwear from the Republic of Korea and the Republic of China to test the denial of entry into the United States. The export visa could only be granted under the terms of the trade agreements which the plaintiffs were seeking to challenge. To attempt to export goods without a visa, and in violation of the export limits, subjected the foreign exporter to "heavy civil and criminal sanctions in the country of export." *Sneaker Circus, Inc., et al.*, 566 F. 2d at 399. Under these circumstances, the United States Court of Appeals

concluded there was "every likelihood that the agreements will be effectively enforced abroad, with the result that no occasion for protest under section 514 will ever present itself, and no Customs Court jurisdiction . . . will arise." *Id.* Therefore, although section 514 *could* have afforded review in the Customs Court, it was *probable* that the jurisdictional prerequisites under section 514 would never be met, thus effectively precluding judicial review.

In the case at bar, none of the circumstances that would warrant the exercise of jurisdiction by the district courts is present. Unlike the *Hammond Lead Products* and *Timken Co.* cases, the issue raised by SCM's complaint, i.e., the correctness of the ITC's negative injury determination, is covered by the statutory scope of this court's jurisdiction under section 516(c). Unlike the plaintiffs in the *Sneaker Circus* case, SCM has already met the jurisdictional prerequisites of section 516(c). Thus, this court is in a position to grant an appropriate remedy to SCM if it should prevail on the merits.

In view of the foregoing, it is the determination of this court that it has jurisdiction over the subject matter of this action. Consequently, SCM's motion, which is treated as a motion to dismiss for lack of subject matter jurisdiction, is denied.

The court is aware that the issue presented upon this motion should be finally resolved as expeditiously as possible. Accordingly, pursuant to the provisions of 28 U.S.C. § 1541(b) and Rule 13.2 of the rules of this court, the court concludes that an immediate appeal from this order may materially advance the ultimate determination of the litigation.

(C.R.D. 78-3)

PASCO TERMINALS, INC. *v.* UNITED STATES

International Trade Commission—
Antidumping Act—Determination of Injury

Court No. 74-5-01357

(Dated June 1, 1978)

Williams & Connolly (*J. Alan Galbraith* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

ORDER

MALETZ, Judge.

Upon reading and filing defendant's motion for a protective order, and upon all other papers and proceedings thereon, it is hereby ORDERED:

1. That the Secretary of the United States International Trade Commission, in compliance with the order of the court dated May 8, 1978 requiring transmittal to the clerk of this court, on or before June 9, 1978, of a certified copy of the transcript of proceedings and exhibits introduced before the Commission in *In the Matter of Elemental Sulphur from Mexico*, Investigation No. AA 1921–92, shall seal the two exhibits introduced on behalf of Freeport Minerals Company (exhibits 2 and 3).

2. That these two exhibits which were received by the Commission on a confidential basis shall be inspected by the court in camera for the purpose of determining whether they should be made available to opposing counsel under a protective order and for the limited purposes of the present litigation.

3. That the basis of this order and the order of May 8, 1978 is to enable the court to determine whether or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law. See, e.g., *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F.2d 1189 (1973): *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct. 19, C.D. 4708, 435 F. Supp. 389 (1977); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Camp* v. *Pitts*, 411 U.S. 138 (1973). *Cf. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). See also letter of Daniel Minchew, Chairman, United States International Trade Commission, November 16, 1977, reproduced in *Hearing Before the Subcommittee on Trade, House Committee on Ways and Means on the Adequacy and the Administration of the Antidumping Act of 1921* (95th Cong., 1st Sess. 1977) pp. 65–66.

(C.R.D. 78-4)

ARMSTRONG BROS. TOOL CO.; BERGMAN TOOL MANUFACTURING CO., INC.; DURO METAL PRODUCTS COMPANY; MILWAUKEE TOOL & EQUIPMENT CO., INC.; H. K. PORTER, INC.; PROTO TOOLS DIVISION, INGERSOLL RAND COMPANY; TOOL GROUP, DRESSER INDUSTRIES, INC.; AND THE WRIGHT TOOL & FORGE COMPANY

v.

UNITED STATES (DAIDO CORPORATION, STEELCRAFT TOOLS DIVISION, PARTY-IN-INTEREST)

Opinion and Order on Defendant's Motion To Compel Discovery

Court No. 77-8-02005

[Motion denied.]

(Dated June 27, 1978)

Stewart & Ikenson (*Frederick L. Ikenson* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William F. Atkin*, trial attorneys), for the defendant.

Tanaka Walders & Ritger (*H. William Tanaka*, *Lawrence R. Walders*, and *Wesley K. Caine* of counsel) for the party-in-interest.

NEWMAN, Judge: This is an American manufacturers' action brought pursuant to 28 U.S.C. § 1582(b) (1970), 28 U.S.C. § 2632(a) (Supp. V 1975) and 19 U.S.C. § 1516(c) (Supp. V 1975), involving the Antidumping Act of 1921, as amended (19 U.S.C. §§ 160, *et seq.*) (1970 & Supp. V 1975) (hereinafter Antidumping Act).

Plaintiffs challenge the negative injury determination of the United States Tariff Commission (now "United States International Trade Commission") in investigation AA1921-141 relating to certain nonpowered hand tools from Japan, as reported in 39 FR 38133-34 (1974). The jurisdictional uncertainty surrounding this action at the time issue was joined was recently resolved in *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78-2 (1978), wherein Chief Judge Re held that the Customs Court has jurisdiction to review a negative injury determination by the Commission in an American manufacturer's action pursuant to 19 U.S.C. § 1516(c). See also my recent opinion in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Great Neck Saw Manufacturing, Incorporated, Party-in-Interest*), 80 Cust. Ct. 160, C.D. 4751 (1978), following the rationale of *SCM*.

Here, after issue was joined, defendant instituted discovery by serving plaintiffs with interrogatories seeking, *inter alia*, "the facts" that constitute the bases for plaintiffs' assertions in their complaint

that the Commission erred by misconstruing the relevant statutory language, misapplying the Antidumping Act, and rendering a decision that was arbitrary, unreasonable, not supported by substantial evidence, and without a rational basis.[1] Plaintiffs responded to these interrogatories by objecting on the ground that they call for "legal argumentation". Defendant now seeks an order compelling answers to the interrogatories in question pursuant to rule 6.5.

It appears that neither party contemplates a trial, but rather a judicial review predicated upon the administrative record (although the perimeters of such "record" are disputed).[2] Plaintiffs' position is that the Commission erred in reaching its negative injury determination as a matter of law. Further, plaintiffs contend that when the "record" has been made available to them, they will in due course file a motion for summary judgment, at which time defendant will be apprised of the facts that defendant presently seeks in its discovery.

Under these circumstances, I see no useful purpose to be served in requiring plaintiffs to analyze the administrative "record" made available to them at this juncture in order to simply give defendant a citation of those portions thereof upon which plaintiffs, in their motion for summary judgment, will rely in support of their legal contentions.[3] Plainly, if discovery were compelled pursuant to defendant's motion, plaintiffs' response would largely be argumentative and contentious. In light of these considerations, the proper objectives of discovery would not be served. See generally 4A *Moore's Federal Practice* § 33.17 (1975)

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[1] Interrogatory Nos. 2, 3 and 4 (a), (b), (c) and (d) of defendant's first interrogatories directed to plaintiffs

[2] For the standard and scope of review applicable to the Commission's injury determinations under the Antidumping Act see the recent order of Judge Maletz in *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78-3 (1978); and also his unpublished order in the same case dated May 8, 1978, requiring transmittal to the Clerk of this Court of a certified copy of the transcript of proceedings and exhibits introduced before the Commission. And see my orders entered concurrently herewith in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 80 Cust. Ct. 252, C.R.D. 78-5 (1978), and *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 80 Cust. Ct. 256, C.R.D. 78-7 (1978).

[3] Plaintiffs state that "parts of what plaintiffs consider to be the record have not yet been made available to plaintiffs" (memorandum 3). In this connection, plaintiffs served upon defendant a set of interrogatories and a request for production of "All documents and things in the files of the United States International Trade Commission and/or individual Commissioners" relating to investigation AA1921-141, which was the basis for the Commission's negative injury determination challenged in this action. Thereupon, defendant moved for a protective order pursuant to rule 6.1(c) seeking to be relieved from responding to plaintiffs' interrogatories and request for production, and seeking to prohibit plaintiffs from conducting discovery into matters beyond the Commission's notice of investigation and hearing (39 FR 27614 (1974)) and the Commission's negative injury determination and statement of reasons (39 FR 38133-34 (1974)). In an order entered by this Court concurrently herewith (C.R.D. 78-5), defendant's motion for a protective order was denied, and citing *Pasco Terminals, Inc.* v. *United States*, *supra*, n.2, and *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 80 Cust Ct. 256, C.R.D. 78-7 (1978), decided concurrently herewith, the Secretary of the Commission was directed to transmit to the Clerk of this Court on or before July 28, 1978, the following: (1) a certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921-141; (2) certified copies of all written submissions, questionnaires, reports and all other documents relating to investigation AA1921-141; and (3) all other things in the files of the Commission relating to the investigation.

Accordingly, defendant's motion for an order compelling discovery is hereby denied. See order of Judge Maletz entered on May 26, 1978, similarly denying defendant's motion for an order compelling discovery in *ASG Industries, Inc. et al.* v. *United States*, Court No. 77–5–00879; and also my opinion and order in *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 80 Cust. Ct. 254, C.R.D. 78–6 (1978), promulgated concurrently herewith.

(C.R.D. 78–5)

ARMSTRONG BROS. TOOL CO.; BERGMAN TOOL MANUFACTURING CO., INC., DURO METAL PRODUCTS COMPANY; MILWAUKEE TOOL & EQUIPMENT CO., INC.; H. K. PORTER, INC.; PROTO TOOLS DIVISION, INGERSOLL RAND COMPANY; TOOL GROUP, DRESSER INDUSTRIES, INC.; AND THE WRIGHT TOOL & FORGE COMPANY

v.

UNITED STATES (DAIDO CORPORATION, STEELCRAFT TOOLS DIVISION, PARTY-IN-INTEREST)

International Trade Commission—
Antidumping Act—Determination of Injury

Court No. 77–8–02005

(Dated June 27, 1978)

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Tanaka Walders & Ritger (*H. William Tanaka, Lawrence R. Walders* and *Wesley K. Caine* of counsel) for the party-in-interest.

ORDER

NEWMAN, Judge.

Plaintiffs having brought an American manufacturers' action pursuant to 28 U.S.C. § 1582(b) (1970), 28 U.S.C. § 2632(a) (Supp. V 1975) and 19 U.S.C. § 1516(c) (Supp. V 1975), in which plaintiffs challenge the negative injury determination of the United States Tariff Commission (now "United States International Trade Commission") in investigation AA1921–141 under the Antidumping Act of 1921, as amended (19 U.S.C. §§ 160, *et seq.* (1970 & Supp. V 1975), relating to the importation of certain nonpowered hand tools from Japan, as reported in 39 FR 38133–34 (1974); and

Plaintiffs having served upon defendant a second set of interrogatories and a second request for production of "All documents and

things in the files of the United States International Trade Commission and/or individual Commissioners, pertaining to the Commission Investigation No. AA1921-141, involving *Wrenches, Pliers, Screwdrivers, and Metal-cutting Snips and Shears from Japan*", which investigation was the basis for the Commission's negative injury determination challenged in this action; and

Defendant having moved for a protective order pursuant to rule 6.1(c) seeking to be relieved from responding to plaintiffs' second set of interrogatories and second request for production, and seeking to prohibit plaintiffs from conducting discovery into matters beyond the Commission's notice of investigation and hearing (39 FR 27614 (1974)) and the Commission's negative injury determination and statement of reasons (39 FR 38133-34 (1974)); now

After careful consideration of defendant's motion, and upon all other papers and proceedings herein, it is hereby ORDERED:

1. That defendant's motion is denied, but nevertheless defendant shall be relieved from responding to plaintiffs' second set of interrogatories and plaintiffs' second request for production of documents and things.

2. That the Secretary of the United States International Trade Commission, Kenneth R. Mason, shall prepare and transmit to Joseph E. Lombardi, Clerk of the United States Customs Court, on or before July 28, 1978, the following: (1) a certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921-141; (2) certified copies of all written submissions, questionnaires, reports and all other documents relating to investigation AA1921-141; and (3) all other things in the files of the Commission relating to the investigation. *Cf.* Judge Maletz' order in *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78-3 (1978), and also his unpublished order in the same case entered on May 8, 1978. See also my order in *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 80 Cust. Ct. 256, C.R.D. 78-7 (1978), entered concurrently herewith.

3. That denial of defendant's present motion for a protective order shall be without prejudice to renewal respecting any documents or things that were received by the Commission on a confidential basis or are otherwise privileged.

4. That the basis of this order is to enable the court to determine whether or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law. See, e.g., *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct. 19, C.D.

4708, 435 F. Supp. 389 (1977); *Cf. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). See also questions and answers attached to the letter of Daniel Minchew, Chairman, United States International Trade Commission, November 16, 1977, reproduced in *Hearing before the Subcommittee on Trade, House Committee on Ways and Means, on the Adequacy and the Administration of the Antidumping Act of 1921* (95th Cong., 1st Sess. 1977) pp. 65–66.

(C.R.D. 78–6)

SPRAGUE ELECTRIC COMPANY *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST)

Opinion and Order on Defendant's Motion To Compel Discovery

Court No. 77–9–03056

(Dated June 27, 1978)

[Motion denied.]

Stewart & Ikenson (*Frederick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William F. Atkin*, trial attorneys), for the defendant.

NEWMAN, Judge: This is an American manufacturer's action brought pursuant to 28 U.S.C. § 1582(b) (1970), 28 U.S.C. § 2632(a) (Supp. V 1975) and 19 U.S.C. § 1516(c) (Supp. V 1975), involving the Antidumping Act of 1921, as amended (19 U.S.C. §§ 160, *et seq.* (1970 & Supp. V 1975)) (hereinafter Antidumping Act).

Plaintiff challenges the negative injury determination of the United States International Trade Commission in investigation AA1921–159 relating to tantalum electrolytic fixed capacitors from Japan, as reported in 41 FR 47604–07 (1976). The jurisdictional uncertainty surrounding this action at the time issue was joined was recently resolved in *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78–2 (1978), wherein Chief Judge Re held that the Customs Court has jurisdiction to review a negative injury determination by the Commission in an American manufacturer's action pursuant to 19 U.S.C. § 1516(c). See also my recent opinion in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Great Neck Saw Manufacturing Incorporated, Party-in-Interest*) 80 Cust. Ct. 160, C.D. 4751 (1978), following the rationale of *SCM*.

Here, after issue was joined, defendant instituted discovery by serving plaintiff with interrogatories seeking, *inter alia*, "the facts" that constitute the bases for plaintiff's assertions in its complaint that the Commission erred by misconstruing the relevant statutory

language, misapplying the Antidumping Act, and rendering a decision that was arbitrary, unreasonable, not supported by substantial evidence, and without a rational basis.[1] Plaintiff responded to these interrogatories by objecting on the ground that they call for "legal argumentation". Defendant now seeks an order compelling answers to the interrogatories in question pursuant to rule 6.5.

It appears that neither party contemplates a trial, but rather a judicial review predicated upon the administrative record (although the perimeters of such "record" are disputed).[2] Plaintiff's position is that the Commission erred in reaching its negative injury determination as a matter of law. Further, plaintiff contends that when the "record" has been made available to it, plaintiff will in due course file a motion for summary judgment, at which time defendant will be apprised of the facts that defendant presently seeks in its discovery.

Under these circumstances, I see no useful purpose to be served in requiring plaintiff to analyze the administrative "record" made available to plaintiff at this juncture in order to simply give defendant a citation of those portions thereof upon which plaintiff in its motion for summary judgment, will rely in support of its legal contentions.[3] Plainly, if discovery were compelled pursuant to defendant's motion, plaintiff's response would largely be argumentative and contentious. In light of these considerations, the proper objectives of discovery would not be served. See generally 4A *Moore's Federal* Practice § 33.17 (1975).

Accordingly, defendant's motion for an order compelling discovery is hereby denied. See order of Judge Maletz entered on May 26, 1978,

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[1] Interrogatory Nos. 2, 3 and 4 (a), (b), (c) and (d) of defendant's first interrogatories directed to plaintiff.

[2] For the standard and scope of review applicable to the Commission's injury determinations under the Antidumping Act see the recent order of Judge Maletz in *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78-3 (1978); and also his unpublished order in the same case dated May 8, 1978, requiring transmittal to the Clerk of this Court of a certified copy of the transcript of proceedings and exhibits introduced before the Commission. And see my orders entered concurrently herewith in *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 80 Cust. Ct. 255, C.R.D. 78-7 (1978), and *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 80 Cust. Ct. 252, C.R.D. 78-5 (1978).

[3] Plaintiff states that "parts of what plaintiff considers to be the record have not yet been made available to plaintiff" (memorandum 3). In this connection, plaintiff served upon defendant a set of interrogatories and a request for production of "All documents and things in the files of the International Trade Commission and/or individual Commissioners" relating to investigation AA1921-159, which was the basis for the Commission's negative injury determination challenged in this action. Thereupon, defendant moved for a protective order pursuant to rule 6.1(c) seeking to be relieved from responding to plaintiff's interrogatories and request for production, and seeking to prohibit plaintiff from conducting discovery into matters beyond the Commission's notice of investigation and hearing (41 F R 33337-38 (1976)) and the Commission's negative injury determination and statement of reasons (41 F R 47604-07 (1976)). In an order entered by this Court concurrently herewith (C.R.D. 78-7), defendant's motion for a protective order was denied, and citing *Pasco Terminals Inc.* v. *United States*, *supra*, n.2, and *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 80 Cust. 252, C.R.D. 78-5 (1978), decided concurrently herewith, the Secretary of the Commission was directed to transmit to the Clerk of this Court on or before July 28, 1978, the following: (1) a certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921-159; (2) certified copies of all written submissions, questionnaires, reports and all other documents relating to investigation AA1921-159; and (3) all other things in the files of the Commission relating to the investigation.

similarly denying defendant's motion for an order compelling discovery in *ASG Industries, Inc. et al.* v. *United States*, Court No. 77–5–00879; and also my opinion and order in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 80 Cust. Ct. 250, C.R.D. 78–4 (1978), promulgated concurrently herewith.

(C.R.D. 78–7)

SPRAGUE ELECTRIC COMPANY *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST)

International Trade Commission—
Antidumping Act—Determination of Injury

Court No. 77–9–03056

(Dated June 27, 1978)

Stewart & Ikenson (*Frederick L. Ikenson* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William F. Atkin*, trial attorneys), for the defendant.

ORDER

NEWMAN, Judge.

Plaintiff having brought an American manufacturer's action pursuant to 28 U.S.C. § 1582(b) (1970), 28 U.S.C. § 2632(a) (Supp. V 1975) and 19 U.S.C. § 1516(c) (Supp. V. 1975), in which plaintiff challenges the negative injury determination of the United States International Trade Commission in investigation AA1921–159 under the Antidumping Act of 1921, as amended (19 U.S.C. §§ 160, *et. seq.* (1970 & Supp. V 1975), relating to the importation of tantalum electrolytic fixed capacitors from Japan, as reported in 41 F.R. 47604–07 (1976); and

Plaintiff having served upon defendant a second set of interrogatories and a second request for production of "All documents and things in the files of the International Trade Commission and/or individual Commissioners, pertaining to the Commission Investigation No. AA1921–159, involving *Tantalum Electrolytic Fixed Capacitors from Japan*", which investigation was the basis for the Commission's negative injury determination challenged in this action: and

Defendant having moved for a protective order pursuant to rule 6.1(c) seeking to be relieved from responding to plaintiff's second set of interrogatories and second request for production, and seeking to prohibit plaintiff from conducting discovery into matters beyond the

Commission's notice of investigation and hearing (41 FR 33337–38) (1976) and the Commission's negative injury determination and statement of reasons (41 FR 47604–07 (1976)); now

After careful consideration of defendant's motion, and upon all other papers and proceedings herein, it is hereby ORDERED:

1. That defendant's motion is denied, but nevertheless defendant shall be relieved from responding to plaintiff's second set of interrogatories and plaintiff's second request for production of documents and things.

2. That the Secretary of the United States International Trade Commission, Kenneth R. Mason, shall prepare and transmit to Joseph E. Lombardi, Clerk of the United States Customs Court, on or before July 28, 1978, the following: (1) a certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921–159; (2) certified copies of all written submissions, questionnaires, reports and all other documents relating to investigation AA1921–159; and (3) all other things in the files of the Commission relating to the investigation. *Cf.* Judge Maletz' order in *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978), and also his unpublished order in the same case entered on May 8, 1978. See also my order in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcroft Tools Division, Party-in-Interest*), 80 Cust. Ct. 252, C.R.D. 78–5 (1978), entered concurrently herewith.

3. That denial of defendant's present motion for a protective order shall be without prejudice to renewal respecting any documents or things that were received by the Commission on a confidential basis or are otherwise privileged.

4. That the basis of this order is to enable the court to determine whether or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law. See, e.g., *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct. 19, C.D. 4708, 435 F. Supp. 389 (1977); *Cf. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). See also questions and answers attached to the letter of Daniel Minchew, Chairman, United States International Trade Commission, November 16, 1977, reproduced in *Hearing before the Subcommittee on Trade, House Committee on Ways and Means, on the Adequacy and the Administration of the Antidumping Act of 1921* (95th Cong., 1st Sess. 1977) pp. 65–66.

(C.R.D. 78–8)

UNITED STATES CUSTOMS COURT

IN THE MATTER OF N. C. TRADING COMPANY, INC. — APPEAL NO. 78–10

(On appeal from an order of the Customs Court denying a motion to intervene in *Airco, Inc.* v. *The United States* 76–3–00643).

(Dated June 30, 1978)

Pursuant to an order entered in the United States Court of Customs and Patent Appeals on June 7, 1978, the undersigned states as follows:

On October 4, 1977, N. C. Trading Company, Inc., hereinafter referred to as the movant, filed with the clerk of the Customs Court a motion pursuant to rules 4.12 and 1.1 of the court rules for leave to intervene in this action which was brought under 19 U.S.C. § 1516 (d) and 28 U.S.C. § 2631(b) and to be named as a party in interest. The movant contended:

1. that 19 U.S.C. § 1516(f) gives a consignee a clear right to participate in proceedings under 19 U.S.C. § 1516 as a party in interest, and that N. C. Trading is a consignee;
2. that the legislative history of section 1516(f) in no way qualifies the plain meaning of the statute;
3. that failure to give effect to section 1516(f) would raise serious constitutional questions since a consignee has a direct and substantial interest in the outcome of the case—an interest not adequately represented by the existing parties; and
4. that the Customs Court has the authority to permit a consignee to participate even though its rules are silent in accordance with guidance provided by the Federal Rules of Civil Procedure.

The parties in this action opposed the motion. On October 17, 1977, plaintiff filed a memorandum in which it contended:

1. the Customs Court lacks authority to permit intervention in the action;
2. that the movant has not established that it is a statutory consignee;
3. that a consignee does not have a statutory right to be a party in interest in a section 1516(d) proceeding;
4. that the movant, even if *arguendo* a statutory consignee, would not be deprived of any constitutional right by not being permitted to intervene in the action;
5. that the court rules impliedly prohibit, and, in any event, do not permit participation of parties in interest in section 1516(d) proceedings;
6. that even were the criteria for intervention under Federal Civil Practice Rule 24(a) available, movant would not qualify; and

7. that movant failed to file a pleading as required under Federal Civil Practice Rule 24(c).

On November 7, 1977, defendant filed a memorandum in which it contended:

1. that movant is not a consignee within the meaning of section 1516(f);
2. that there is no statutory authority for third-party intervention in a section 1516(d) proceeding and, as the Customs Court is a court of limited statutory authority, none may be implied;
3. that section 1516(d), by its very nature, is intended to be a two party action between the domestic manufacturer and the government;
4. that in the event the domestic manufacturer prevails in a section 1516(d) proceeding and countervailing duties are assessed on future entries of merchandise as a result the consignees therein have an adequate remedy at law; and
5. that in the absence of any express or implied authority to intervene reference to the Federal Rules of Civil Procedure is inapposite.

After due consideration and deliberation upon the moving and opposition papers the court agreed with the basic and underlying contentions of the parties, plaintiff and defendant, and, accordingly, denied the motion. In so doing, the court found as facts:

1. that section 1516(f) employs the definite article "The" before the word "consignee" and not the indefinite article "A" before such word as contended for by the movant, and, therefore, the word "consignee" has limited textual application;
2. that the validity of section 1516(d) was not challenged by the movant on any constitutional grounds in its motion to intervene.

Accordingly, the court concluded as matters of law:

1. that the words "The consignee" in section 1516(f) refer *solely* to the consignee of the entry underlying the three party action provided for in 19 U.S.C. § 1516(c) between the American manufacturer, the United States, and the consignee of an entry of merchandise upon which the action is predicated and whose right to intervene is provided for in rule 5.1 of the Customs Court rules;
2. that section 1516(d) provides only for the maintenance of a two party action in the Customs Court between the American manufacturer and the United States, independent of any particular entry of merchandise; and
3. that absent a statutory basis the movant lacks standing to intervene, and the Customs Court lacks power to permit intervention of additional parties not properly before the court.

SCOVEL RICHARDSON,
Judge, United States Customs Court.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

DEPARTMENT OF THE TREASURY, *January 16, 1978.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

ROBERT E. CHASEN,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/1	Ford, J. January 5, 1978	J. E. Bernard & Co., Inc.	70/66671	Item 653.37 15%	Item 653.35 8%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	Chicago Brass candlesticks
P78/2	Ford, J. January 5, 1978	Border Brokerage Co., Inc.	70/27034, etc.	Item 207.00 15%, 13%, 11.5% 10% or 8% (fence sections and fence gates marked "A") Item 202.54 7%, 6% or 5% (corner adapters and cleats marked "A"; fence posts marked "B")	Item 200.75 Free of duty (items marked "A") Item 200.60 Free of duty (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Blaine (Seattle) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/3	Watson, J. January 5, 1978	American Import Co.	72-6-01453	Item 748.20 25%, 23.5% or 22%	Item 774.60 13.5%, 11.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	San Diego; Los Angeles Merchandise in e.v. of plastic
P78/4	Maletz, J. January 5, 1978	Montgomery Ward & Co.	75-9-02309	Item 382.04 42.5% + 25¢ per lb. (through an error in liquidation)	Item 382.04 42.5%	Judgment on the pleadings	New York 3 piece pants suits (dutiable value $5400)
P78/5	Maletz, J. January 9, 1978	Pacific Wood Products Co.	76-9-02063	Item 240.25 20%	Item 240.23 12%	Agreed statement of facts	Philadelphia Plywood
P78/6	Newman, J. January 9, 1978	U.S. Import Equipment Dist., Inc.	76-1-00141, etc.	Item 652.35 9.5% (items marked "A" and "B")	Item 652.15 6% (items marked "A") Item 652.18 6% (items marked "B")	Kelco Incorporated et al. v. U.S. (C.D. 3031); Border Brokerage Company et al. v. U.S. (C.D. 2947) (items marked "A" and "B")	Los Angeles Chain or chains, and parts thereof used for transmission of power (items marked "A" and "B")
P78/7	Watson, J. January 17, 1978	Hub Floral Corp.	74-8-02136	Item 748.21 42.5%	Item 642.97 15%, 13.5%, 11%, 9.5%, 8.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material (chenille stems)

P78/8	Re, C. J. January 23, 1978	American Asian Trading Co. et al.	64/11615, etc.	Pars. 1537(b)/1559 12½%	Par. 1558 8½%	U.S. v. Weather-Rite Sportswear Co., Inc. (C.A.D. 848)	New York Synthetic rubber articles
P78/9	Re, C. J. January 23, 1978	Bruest Industries, Inc., a Delaware Corporation	76-3-00669	Item 656.05 20%	Item 432.00 5%	Agreed statement of facts	Kansas City (St. Louis) Chemical compound mixture of platinum salts and asbestos
P78/10	Richardson, J. January 23, 1978	General Instrument Corporation	70/57512	Items 685.20/ 807.00 9% With allowance for certain U.S. fabricated components, but without allowance for certain other components, i.e., wire, tape, mylar and paper	Items 685.20/ 807.00 9% with cost or value of items marked "K" (U.S. fabricated components) deductible from full value of imported articles	General Instrument Corporation v. U.S. (C.D. 4507)	New York American goods returned; flybacks (horizontal output transformers); U.S; fabricated components
P78/11	Richardson, J. January 23, 1978	I.T.T. Semiconductors	75-5-00997	Item 687.60 6% Without allowance under item 807.00	Items 687.60/ 807.00 6% upon full value of imported articles, less cost or value of U.S. fabricated components as shown on commercial invoice	U.S. v. Texas Instruments Incorporated (C.A.D. 1178)	West Palm Beach (Miami) American goods returned; integrated circuits incorporating U.S. produced silicon dice

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/12	Boe, J. January 23, 1978	Knickerbocker Liquors Corp.	74-11-03088	Duty assessed on 58 cartons of scotch whiskey reported "manifested, not found"	Duty should not have been assessed on merchandise reported as "manifested, not found"	Agreed statement of facts	New York Shortage; scotch whiskey
P78/13	Re, C.J. January 30, 1978	V. G. Nahrgang Co. et al.	76-8-01764, etc.	Item 113.25 15%	Item 113.20 10%	Agreed statement of facts	Detroit Fish products, blanched quick frozen, not in oil
P78/14	Landis, J. January 30, 1978	Continental Fastener Corp.	76-9-02171	Item 646.42 9.5%	Item 646.56 0.1¢ per lb.	Agreed statement of facts	Chicago Nylon insert clinch nuts
P78/15	Watson, J. January 30, 1978	B.P.M. International, Ltd.	75-5-01007	Item 685.30 8% and 6.5%	Item 678.50 6% and 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Combination article containing tape player as important element
P78/16	Watson, J. January 30, 1978	Horne & Ross Sales, dba Horne Sales, Inc., et al.	71-8-00672, etc.	Item 389.60 25¢ per lb.+ 15%, 18% or 21%	Item 735.20 10%, 12% or 14%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P78/17	Watson, J. January 30, 1978	Hub Floral Corp.	73-9-02586	Item 748.21 42.5%	Item 642.97 15%, 13.5%, 9.5%, 8.5%	Hub Floral Corp. v. U.S. (C.D. 4669)	Boston Wire covered with textile materials (chenille stems)

P78/18	Re, C. J. February 9, 1978	V. G. Nahrgang Co.	76-9-02067.	Item 113.25 15%	Item 113.20 10%	Agreed statement of facts	Detroit Fish products, blanched, quick frozen, not in oil
P78/19	Re, C. J. February 9, 1978	State Metals, Inc.	76-6-01378	Item 613.18 7.5%+0.6¢ per lb.	Item 654.00 5%	Agreed statement of facts	New York Toilet and sanitary wares of brass (brass floor flanges)
P78/20	Re, C. J. February 21, 1978	F. W. Woolworth Co.	75-5-01038	Item 700.60 20%	Item 700.55 6%	Agreed statement of facts	San Francisco Ladies woven scuffs (vinyl footwear)
P78/21	Re, C. J. February 24, 1978	M. Paquet & Co., Inc.	75-11-02821	Item 642.30 25%	Item 642.65 0.6¢ per lb.+ 5%	Judgment on the pleadings	New York "Brass 80/20 Alloy Woven Wire Cloth"
P78/22	Maletz, J. February 24, 1978	Shayne Knitwear, Inc.	75-9-02420	Item 382.78 25¢ per lb. +32.5% (blouses)	Item 382.33 16.5% (entirety)	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies three piece suits; entireties
P78/23	Newman, J. February 24, 1978	Winter-Wolff International Corporation	74-1-00107	Item 613.18 7.5% + 0.6¢ per lb.	Item 654.00 5%	Agreed statement of facts	Houston Toilet and sanitary wares of brass (brass floor flanges)
P78/24	Re, C.J. March 2, 1978	Tanross Supply Co., Inc.	68/5565	Item 651.75 At converted rate of 38% to 47%	Item 708.71 25%	Judgment on the pleadings [defendant's motion to dismiss denied; plaintiff's motion for judgment on the pleadings granted]	Miami "1553 Microscope Dissecting Kit"; sets containing microscopes
P78/25	Re, C.J. March 2, 1978	Tanross Supply Co., Inc.	68/15995	Item 651.75 At converted rate of 38% to 47%	Item 708.71 25%	Judgment on the pleadings [defendant's motion to dismiss denied; plaintiff's motion for judgment on the pleadings granted]	Miami "1553 Microscope Dissecting Kit"; sets containing microscopes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED Par. or Item No. and Rate	HELD Par. or Item No. and Rate	BASIS	PORT OF ENTRY AND MERCHANDISE
P78/26	Watson, J. March 6, 1978	Compass Instrument & Optical Co., Inc., et al.	77-2-00261, etc.	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	New York Backpacking tents
P78/27	Ford, J. March 7, 1978	Norman Jensen, Inc.	75-10-02698	Item 692.35 5.5% Item 664.05 5%	Item 692.30 Free of duty	Judgment on the pleadings	Noyes (Pembina) "Tree Farmer Diesels"; "Dozer Weldments" (tractors for agricultural use and parts)
P78/28	Richardson, J. March 10, 1978	Bruest Industries, Inc., a Delaware corporation	75-6-01482	Item 656.05 20%	Item 432.00 5%	Agreed statement of facts	Kansas City (St. Louis) Chemical compound mixture of platinum salts and asbestos
P78/29	Watson, J. March 10, 1978	Hub Floral Corp.	74-3-00793	Item 748.21 42.5%	Item 642.97 13.5% or 8.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material; chenille stems
P78/30	Watson, J. March 10, 1978	Hub Floral Corp.	76-1-00215	Item 748.21 42.5%	Item 642.97 11%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material; chenille stems
P78/31	Watson, J. March 10, 1978	Hub Floral Corp.	76-2-00442	Item 748.21 42.5%	Item 642.97 8.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material; chenille stems
P78/32	Watson, J. March 10, 1978	Hub Floral Corp.	76-5-01216	Item 748.21 42.5%	Item 642.97 8.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material; chenille stems

P78/33	Richardson, J. March 13, 1978	New York Merchandise Co., Inc.	70/3884	Item 653.39 19%	Item 688.40 9%	Ross Products, Inc. v. U.S. (C.A.D. 994); U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	San Diego Star treetops, circle treetops, etc.
P78/34	Watson, J. March 15, 1978	Hub Floral Corp.	72-2-00291	Item 748.21 42.5%	Item 642.97 11% or 9.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material; chenille stems
P78/35	Watson, J. March 15, 1978	Hub Floral Corp.	72-10-02198	Item 748.21 42.5%	Item 642.97 11% or 9.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material; chenille stems
P78/36	Watson, J. March 15, 1978	Mobay Chemical Corp.	74-1-00211	Item 405.25 9%+1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	Chicago Hydroxylated polyurethane products; Desmocoll 400
P78/37	Boe, J. Decided on remand of C.D. 4642 (C.A.D. 1187) March 15, 1978. (Action submitted on record and agreed statement of facts.)	The Englishtown Corporation	69/9811	Item 544.51 29.5%	Item 706.60 20%	Agreed statement of facts	New York "Electric Travel Beauty Kits"; luggage
P78/38	Ford, J. March 22, 1978	The Akron	73-12-03310	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass candlesticks
P78/39	Watson, J. March 22, 1978	B.P.M. International, Ltd.	75-3-00735	Item 685.30 8%	Item 678.50 6%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Combination article containing tape player as important element

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/40	Watson, J. March 22, 1978	Camp-Ways, Inc.	77-7-01253	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P78/41	Watson, J. March 22, 1978	Mobay Chemical Corp.	75-12-03078, etc.	Item 405.25 9% + 1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	Boston Hydroxylated polyurethane products; Desmocoll 400, etc.
P78/42	Boe, J. March 22, 1978	F. B. Vandegrift & Co., Inc., et al.	69/15966, etc.	Item 544.51 29.5%, 26.5% or 23.5%	Item 688.40 10%, 9% or 8%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Philadelphia Mirrors with electric lights
P78/43	Richardson, J. March 23, 1978	Reliance Trading Corp.	75-10-02746	Item 748.20 21%	Item 774.60 8.5%	Judgment on the pleadings Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial flowers, etc.
P78/44	Watson, J. March 23, 1978	Mobay Chemical Corp.	74-3-00659, etc.	Item 405.25 9%+1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	Boston Hydroxylated polyurethane products; Desmocoll 400, etc.
P78/45	Ford, J. March 24, 1978	American Import Co. et al.	70/63709, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Brass candlesticks, candleholders, etc.

P78/46	Rao, J. March 28, 1978	Adolco Trading Corp.	73-1-00179	Item 708.60 20%	Item 774.60 10%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Plastic shopping bags
P78/47	Ford, J. March 28, 1978	The Akron	76-1-00278	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass candlesticks
P78/48	Ford, J. March 28, 1978	Hong Horizons, Inc.	76-1-00234	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass candlesticks
P78/49	Landis, J. March 28, 1978	Lion Office Products, Inc.	74-3-00690	Item 760.05 2¢ each+13.5%	Item 760.15 20%	Agreed statement of facts	Los Angeles Marking pens
P78/50	Boe, J. March 28, 1978	Shultz Steel Company	75-6-01480	Item 674.53 7%	Item 664.10 5%	Agreed statement of facts	Los Angeles Machines used to lift, handle and move diverse articles and materials, with functions the same as hoists, winches, jacks and cranes
P78/51	Ford, J. March 29, 1978	United China & Glass Co.	72-9-02009	Item 653.37 11%	Item 653.35 6%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New Orleans Candleholders, candlesticks etc.
P78/52	Richardson, J. March 29, 1978	The Procter & Gamble Mfg. Co., Inc.	76-3-00842	Item 176.09 1¢ per lb.	Item 176.08 Free of duty	Agreed statement of facts	New York Crude Philippine coconut oil (2,950,837 lbs., entry 265273)
P78/53	Landis, J. March 29, 1978	Nichimen Co. Inc., et al.	66/57790, etc.	Par. 216 15%	Par. 1558 8.5%	Rettinger Raincoat Mfg. Co. v. U.S. (C.A.D. 989)	New York Synthetic rubber articles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/54	Richardson, J. April 7, 1978	Bruest Industries, Inc., a Delaware corporation	77-11-04791	Item 656.05 20%	Item 432.00 5%	Agreed statement of facts	Kansas City (St. Louis) Chemical compound mixture of platinum salts and asbestos, a catalyst used in the production of flame mats for catalytic heaters
P78/55	Richardson, J. April 7, 1978	H. E. Lauffer Co., Inc.	75-4-00779, etc.	Item 533.66 10¢ per doz. pcs. + 36% Item 533.65 10¢ per doz. pcs. + 55%	Item 533.28 5¢ per doz. pcs. + 10.5%	Agreed statement of facts	New York Household ware of fine grained earthenware or stoneware, available in specified sets
P78/56	Watson, J. April 10, 1978	Naftone, Inc., et al.	68/29956, etc.	Item 405.25 18%+2.8¢ per lb.; 16%+2.5¢ per lb.; 14%+ 2.2¢ per lb.; 12.5%+1.9¢ per lb.; 10.5%+1.6¢ per lb.; 9%+ 1.4¢ per lb.	Item 494.60 5%, 4%, 3% or 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Hydroxylated polyurethane products; Desmocoll 400, etc.
P78/57	Watson, J. April 10, 1978	The Newman Importing Co., Inc., dba The Newman Co., et al.	76-7-01622, etc.	Item 389.60 25¢ per lb.+ 24%, 21% or 15%	Item 735.20 16%, 14%, or 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Backpacking tents

P78/58	Boe, J. April 10, 1978	General Electric Company	77-10-04459	Item 544.51 17.5%	Item 688.40 5.5%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Philadelphia Electrical makeup appliances incorporating mirrors, lights and other features
P78/59	Watson, J. April 17, 1978	Naftone, Inc., Industrial Chemicals Division	68/60242	Item 405.25 18%+2.8¢ per lb.	Item 494.60 8%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Desmocoll 400
P78/60	Rao, J. April 20, 1978	S.S. Kresge Co.	76-2-00341	Item 706.60 20%	Item 774.60 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	Longview (Portland, Oreg.) Vinyl shopping bags
P78/61	Landis, J. April 20, 1978	General Instrument Corporation	74-10-02809-S	Item 685.20 9%	Items 685.20/807.00 9% with cost or value of U.S. components ($57,995.71) deductible from full value of imported merchandise	Agreed statement of facts	New York American goods returned; television deflection yokes; U.S. components
P78/62	Ford, J. May 3, 1978	International Harvester Company et al.	77-8-01480, etc.	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Buffalo-Niagara Falls (Buffalo) Tractors suitable for agricultural use
P78/63	Watson, J. May 16, 1978	International Seaway Trading Corp.	75-5-01016	Item 700.60 20%	Item 700.55 6%	Agreed statement of facts	New York Vinyl footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/64	Watson, J. May 18, 1978	Berger and Plate Company	77-5-00706	Item 140.16 1.5¢ per lb.	GSP A 140.16 Duty free	Agreed statement of facts	Houston Pea beans from Ethiopia (properly classifiable under the General System of Preferences, as established by Executive Order 11888 pursuant to par. 503(b), Trade Act of 1974)
P78/65	Watson, J. May 24, 1978 [Abs. P75/510 on remand per C.A.D. 1182]	Avdel Corporation	68/31823, etc.	Item 657.20 19%, 17%, 15% or 13%	Item 646.41 14%, 12.5%, 11% or 9.5%	Avdel Corp. v. U.S. (C.D. 4575)	New York "Avex Rivets"
P78/66	Ford, J. June 8, 1978	T. D. Downing Co.	69/27782, etc.	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Boston Brass candlesticks, lanterns, etc.
P78/67	Ford, J. June 8, 1978	Metasco, Inc.	75-11-02793	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks
P78/68	Ford, J. June 8, 1978	F. W. Myers & Co., Inc.	77-5-00762, etc.	Item 692.16 5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Champlain-Rouses Point (Ogdensburg) Skidder tractors, which are suitable for agricultural use

P78/69	Watson, J. June 9, 1978	Perkin-Elmer Corporation	76-7-01746	Item 708.78 15%	Item 851.60 Free of duty	Agreed statement of facts	Chicago One electron microscope, model HU-12, entered for use of nonprofit institution established for educational purposes
P78/70	Newman, J. June 9, 1978	Durst Industries, Inc.	68/21192, etc.	Item 657.35 1.275¢ per lb. plus 15%	No separate appraisements for strainers and bases; liquidations premature and void; protests dismissed as premature; entries ordered returned to district director for appropriate administrative action	Hancock Gross Mfg., Inc. v. U.S. (C.D. 3459) Hancock Gross, Inc. v. U.S. (C.D. 4662)	Philadelphia Sink strainers and bases (not entireties)
P78/71	Ford, J. June 15, 1978	WMF of America, Inc.	73-8-02130	Item 653.37 11% or 9.5%	Item 653.35 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks
P78/72	Boe, J. June 15, 1978	The Englishtown Corp.	69/39027	Item 544.51 33%	Item 706.60 20%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Francisco Electric travel beauty kits; luggage
P78/73	Watson, J. June 16, 1978	Corham Artificial Flower Co.	71-7-00475	Item 748.20 28% or 23.5%	Item 774.60 17% or 11.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4296)	New York Artificial flowers, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/74	Watson, J. June 16, 1978	Corham Artificial Flower Co.	75-2-00482	Item 748.20 21%	Item 774.60 8.5%	Judgment on the pleadings Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Artificial flowers, etc.
P78/75	Maletz, J. June 16, 1978	J. C. Penney Purchasing Corporation	75-12-03130-8	Item 791.75 6% (jackets) Item 382.58 20% + 37.5¢ per lb. (shell and pant components) Appraised as separate articles on basis of export value	Item 791.75 6% (entireties) Dutiable on basis of export value at per set values of $41, $32 and $38	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	Los Angeles Ladies 3-piece pant suits, style Nos. 200, 984, and 7392 (each comprised of jacket, pants, and shell); entirety
P78/76	Richardson, J. June 19, 1978	International Mercantile Corp.	70/5641, etc.	Item 653.39 19%	Item 688.40 9%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	San Diego Angel treetops with lights
P78/77	Watson, J. June 19, 1978	Montgomery Ward & Co., Inc.	77-2-00139	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	San Francisco Nylon two-man Mountain tents

P78/78	Boe, J. June 19, 1978	Albert E. Price, Inc.	69/36498	Item 544.51 29.5%	Item 688.40 10%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Philadelphia Mirrors with electric lights
P78/79	Boe, J. June 20, 1978	F. W. Woolworth Co.	75-5-01027	Item 737.90 17.5%	Item 735.20 10%	Agreed statement of facts	Charleston Ring toss games
P78/80	Maletz, J. June 29, 1978	Sabrina Knits, Ltd.	76-6-01362, etc.	As separate articles as set forth in schedule B attached to decision and judgment Appraised as separate articles on basis of export value	Item 772.30 12.5% Item 791.75 6% Dutiable as entireties on basis of export value; said value is sum of separate invoice unit values	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Women's wearing apparel (2- and 3-piece suits); sets or entireties
P78/81	Maletz, J. June 29, 1978	Shayne Knitwear, Inc.	76-1-00208	Item 382.78 25¢ per lb. +32.5% (blouses and pants) Item 382.58 37.5¢ per lb. +20% (pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties

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ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/1	Landis, J. January 5, 1978	RCA Victor Record Division	R65/17319	Constructed value	30.00 pesos ($2.40) each	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	New York Phonograph records (12" 1963)
R78/2	Watson, J. January 5, 1978	Given International, Inc.	R68/15873, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes
R78/3	Watson, J. January 9, 1978	Given Machinery et al.	R68/11145, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes
R78/4	Watson, J. January 9, 1978	Given International, Inc.	R68/17494, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes
R78/5	Watson, J. January 9, 1978	Given International, Inc.	R69/8759, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes
R78/6	Watson, J. January 9, 1978	Given International, etc.	R70/8417, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/7	Watson, J. January 11, 1978	Geigy Chemical Corporation	R65/25471, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/8	Watson, J. January 11, 1978	Sandoz, Inc.	R65/23441, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dye-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs.

					stuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/9	Watson, J. January 11, 1978	Sandoz, Inc.	R65/23517, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/10	Watson, J. January 11, 1978	Sandoz-Wander, Inc.	75-2-00395, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.28 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/11	Rao, J. January 12, 1978	Patrick & Graves	R65/10665, etc.	Cost of production	Specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R78/12	Rao, J. January 12, 1978	Patrick & Graves	R65/23720	Cost of production	DM4096.80 (3 model 311); DM5241.60 (2 model 361)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles

R78/13	Watson, J. January 12, 1978	Geigy Chemical Corporation	R67/07099, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/14	Watson, J. January 12, 1978	Geigy Chemical Corporation	R67/17421, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by cus-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
					toms officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/15	Watson, J. January 12, 1978	Sandoz, Inc.	R65/19609, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/16	Watson, J. January 17, 1978	Geigy Chemical Corporation	R67/19089, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/17	Rao, J. January 18, 1978	Patrick & Graves, Inc.	R65/23177, etc.	Cost of production	At values specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/18	Rao, J. January 18, 1978	Patrick & Graves	R66/1684, etc.	Cost of production	At values specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R78/19	Rao, J. January 18, 1978	Patrick & Graves	R66/11935, etc.	Cost of production	At values specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R78/20	Ford, J. January 23, 1978	Freedman & Slater, Inc., a/c Carpets From London, Inc.	73-10-02824	Export value	At price-list prices, net packed, less trade and cash discounts, as set forth on schedule attached to decison and judgment	Agreed statement of facts	Chicago Floor coverings
R78/21	Watson, J. January 26, 1978	Geigy Chemical Corporation	R65/18438, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/22	Watson, J. January 26, 1978	Geigy Chemical Corporation	R66/05000, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/23	Watson, J. January 26, 1978	Geigy Chemical Corporation	R66/05661, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/24	Watson, J. January 26, 1978	Sandoz, Inc.	R65/17472, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/25	Watson, J. January 26, 1978	Sandoz, Inc.	R65/23904, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/26	Watson, J. January 26, 1978	Sandoz, Inc.	R67/16482, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/27	Watson, J. January 30, 1978	Geigy Chemical Corporation	R66/02752, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less cost of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/28	Watson, J. February 9, 1978	Ciba Chemical and Dye Company	R60/7370, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C. A.D. 1155)	New York Benzenoid dyestuffs

R78/29	Watson, J. February 9, 1978	Geigy Chemical Corporation	R65/18055, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/30	Watson, J. February 9, 1978	Geigy Chemical Corporation	R65/18794, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/31	Rao, J. February 17, 1978	Investment Associates, Inc., et al.	R60/1495, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Los Angeles Volkswagen automobiles
R78/32	Watson, J. February 17, 1978	Ciba Chemical and Dye Company	R65/24025	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/33	Watson, J. February 17, 1978	Ciba Chemical and Dye Company	R66/18847, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/34	Watson, J. February 17, 1978	Ciba Chemical and Dye Company	R69/9374, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/35	Watson, J. February 17, 1978	Ciba Chemical and Dye Company	R60/11834, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/36	Watson, J. February 17, 1978	Geigy Chemical Corporation	R65/23405, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/37	Watson, J. February 17, 1978	Geigy Chemical Corporation	R66/06233, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/38	Watson, J. February 17, 1978	Geigy Chemical Corporation	R66/06620, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/30	Watson, J. February 17, 1978	Geigy Chemical Corporation	R66/23010, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/40	Watson, J. February 17, 1978	Geigy Chemical Corporation	R67/03493, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/41	Watson, J. February 21, 1978	Ciba Chemical and Dye Company	R66/17047, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/42	Watson, J. February 21, 1978	Geigy Chemical Corporation	R65/24106, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/43	Watson, J. February 21, 1978	Geigy Chemical Corporation	R66/09057, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/44	Watson, J. February 21, 1978	Geigy Chemical Corporation	R66/10123, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/45	Watson, J. February 21, 1978	Geigy Chemical Corporation	R66/16365, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/46	Watson, J. February 22, 1978	Ciba Chemical and Dye Company	R66/18309, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/47	Watson, J. February 22, 1978	Geigy Chemical Corporation	R65/18051, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/48	Watson, J. February 22, 1978	Geigy Chemical Corporation	R66/13732, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/49	Watson, J. February 22, 1978	Geigy Chemical Corporation	R66/16507, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/50	Watson, J. February 22, 1978	Geigy Chemical Corporation	R66/23837, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/51	Watson, J. February 22, 1978	Geigy Chemical Corporation	R67/07387, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/52	Watson, J. February 23, 1978	Ciba Chemical and Dye Company	R66/15762, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/53	Watson, J. February 23, 1978	Ciba Chemical and Dye Company	R69/3685, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/54	Watson, J. February 23, 1978	Ciba Chemical and Dye Company	R70/2130, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/55	Watson, J. February 23, 1978	Geigy Chemical Corporation	R65/18606, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/56	Watson, J. February 23, 1978	Geigy Chemical Corporation	R65/19860, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/57	Watson, J. February 23, 1978	Geigy Chemical Corporation	R66/05657, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/58	Watson, J. February 23, 1978	Geigy Chemical Corporation	R66/13747, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/59	Watson, J. February 23, 1978	Geigy Chemical Corporation	R66/16976, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by cus-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					toms officer at time of appraisement; less 35.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/60	Rao, J. February 24, 1978	Patrick & Graves	R65/18817, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R78/61	Rao, J. February 24, 1978	Patrick & Graves	R67/1340, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/62	Watson, J. February 24, 1978	Ciba Chemical and Dye Company	R66/14776, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/63	Watson, J. February 24, 1978	Ciba Chemical and Dye Company	R66/19743, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/64	Watson, J. February 24, 1978	Ciba Chemical and Dye Company	R67/4574, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/65	Watson, J. February 27, 1978	Ciba Chemical and Dye Company	R66/1842, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/66	Watson, J. February 27, 1978	Ciba Chemical and Dye Company	R66/18258, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/67	Watson, J. February 27, 1978	Ciba Chemical and Dye Company	R66/18856, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/68	Watson, J. February 27, 1978	Ciba Chemical and Dye Company	R66/20358, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind;	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/69	Watson, J. February 27, 1978	Ciba Chemical and Dye Company	R67/4025, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1156)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/70	Watson, J. February 28, 1978	Ciba Chemical and Dye Company	R66/14771, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/71	Watson, J. February 28, 1978	Ciba Chemical and Dye Company	R66/17017, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/72	Watson, J. February 28, 1978	Ciba Chemical and Dye Company	R66/28403, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/73	Watson, J. February 28, 1978	Ciba Chemical and Dye Company	R67/4576, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/74	Watson, J. February 28, 1978	Ciba Chemical and Dye Company	R68/18904, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind;	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/75	Watson, J. March 1, 1978	Ciba Chemical and Dye Company	R66/16985, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/76	Watson, J. March 1, 1978	Ciba Chemical and Dye Company	R66/17028, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/77	Watson, J. March 1, 1978	Ciba Chemical and Dye Company	R67/9121, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/78	Watson, J. March 2, 1978	Ciba Chemical and Dye Company	R60/8554, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/79	Watson, J. March 2, 1978	Ciba Chemical and Dye Company	R66/18291, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/80	Watson, J. March 2, 1978	Ciba Chemical and Dye Company	R66/18850, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/81	Watson, J. March 6, 1978	Ciba Chemical and Dye Company	R66/10742, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/82	Watson, J. March 6, 1978	Ciba Chemical and Dye Company	R67/622, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/83	Watson, J. March 6, 1978	Geigy Chemical Corporation	R66/05322, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/84	Ford, J. March 7, 1978	Lasco Rubber Company	R62/12621	American selling price	$1.73 less 6% (per pair)	Agreed statement of facts	New York Footwear
R78/85	Landis, J. March 7, 1978	Strombecker Corp.	R68/7665, etc.	Constructed value	Ex-factory invoice unit price, net, packed, plus appraised value of tooling charges	Strombecker Corp. v. U.S. (C.D. 4653)	Chicago Electrical equipment, games, road race sets, gloves, models, toys and parts of all the foregoing
R78/86	Ford, J. March 8, 1978	Durham Industries, Inc.	76-2-00336	Export value	Appraised value less 13%	Agreed statement of facts	Houston Toys
R78/87	Ford, J. March 8, 1978	Durham Industries, Inc.	76-2-00493	Export value	Appraised value less 13%	Agreed statement of facts	Oakland (San Francisco) Toys
R78/88	Ford, J. March 8, 1978	Durham Industries, Inc.	77-6-00095	Export value	Appraised value less 13%	Agreed statement of facts	Norfolk Toys
R78/89	Landis, J. March 8, 1978	Durham Industries, Inc.	76-5-01054	Export value	Appraised value less 13%	Agreed statement of facts	Portland, Oreg. Toys

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/90	Watson, J. March 13, 1978	Ciba Chemical and Dye Company	R65/24026, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/91	Watson, J. March 13, 1978	Ciba Chemical and Dye Company	R66/6883, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/92	Watson, J. March 13, 1978	Ciba Chemical and Dye Company	R66/15860, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/93	Watson, J. March 14, 1978	Ciba Chemical and Dye Company	R65/20097, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/94	Watson, J. March 14, 1978	Ciba Chemical and Dye Company	R66/15662, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/95	Watson, J. March 14, 1978	Ciba Chemical and Dye Company	R66/26368, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/96	Watson, J. March 14, 1978	Ciba Chemical and Dye Company	R66/24891, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/97	Watson, J. March 14, 1978	Ciba Chemical and Dye Company	R66/25706, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/98	Watson, J. March 14, 1978	Ciba Chemical and Dye Company	R69/6343, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/99	Watson, J. March 15, 1978	Ciba Chemical and Dye Company	R66/19718, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/100	Watson, J. March 15, 1978	Ciba Chemical and Dye Company	R69/8491, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/101	Watson, J. March 16, 1978	Ciba Chemical and Dye Company	R70/6233, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/102	Watson, J. March 16, 1978	Ciba Chemical and Dye Company	R70/6234, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/103	Watson, J. March 16, 1978	Sandoz, Inc.	R67/15441, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/104	Watson, J. March 20, 1978	Ciba Chemical and Dye Company	R65/20094, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/105	Watson, J. March 20, 1978	Sandoz, Inc.	R66/3101, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/106	Watson, J. March 20, 1978	Sandoz, Inc.	R66/5328, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expense usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/107	Watson, J. March 20, 1978	Sandoz, Inc.	R70/269, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/108	Watson, J. March 21, 1978	Sandos, Inc.	R69/11553, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 21.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/109	Watson, J. March 21, 1978	Sandor, Inc.	R70/3711; etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and in-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					surance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.28 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/110	Richardson, J. March 21, 1978	Durham Industries, Inc.	76-5-01053, etc.	Export value	Appraised value less 13%	Agreed statement of facts	Portland, Oreg. Toys
R78/111	Watson, J. March 23, 1978	Ciba Chemical and Dye Company	R65/17039, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/112	Watson, J. March 23, 1978	Ciba Chemical and Dye Company	R66/22274, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/113	Watson, J. March 23, 1978	Ciba Chemical and Dye Company	R66/22314, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dye-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					stuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/114	Watson, J. March 24, 1978	Ciba Chemical and Dye Company	R66/17026, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/115	Watson, J. March 24, 1978	Ciba Chemical and Dye Company	R66/21633, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/116	Watson, J. March 24, 1978	Ciba Chemical and Dye Company	R68/8467, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dye-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					stuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/117	Watson, J. March 24, 1978	Ciba Chemical and Dye Company	R69/11322, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/118	Watson, J. March 24, 1978	Ciba Chemical and Dye Company	R70/1714, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R78/119	Watson, J. March 24, 1978	Ciba Chemical and Dye Company	R70/6232, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/120	Rao, J. March 29, 1978	Usico Imports, Inc.	R67/21140	Cost of production	DM3590.97 (type 113); DM3666.55 (type 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/121	Watson, J. April 17, 1978	Given International Inc.	R68/5463, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes and accessories
R78/122	Maletz, J. April 17, 1978	C. J. Tower & Sons of Buffalo, Inc.	74-5-01130	Constructed value	Invoice value of $3,745.00 plus tooling and assists valued at $189,957.45, net, packed, less value of U.S. content included at U.S. $944.00	Agreed statement of facts	Buffalo 42" Lawson Pacemaker II Hydraulic Clamp Cutter, Serial BA 1527
R78/123	Rao, J. April 18, 1978	Lone Star Finance Corporation	R62/6440, etc.	Cost of production	Specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R78/124	Watson, J. April 18, 1978	Ciba Chemical and Dye Company	R69/11841, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by cus-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					toms officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R78/126	Watson, J. April 18 1978	Geigy Chemical Corporation	R66/19186, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R78/126	Landis, J. May 3, 1978	Fourco Glass Co.	76-10-02241	Export value	Equal to those set forth on schedule attached to decision and judgment	Agreed statement o. facts	Charleston, W. Va. (Norfolk) Various copies of blueprint diagrams of a float glass company

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/127	Landis, J. May 3, 1978	International Seaway Trading Corp. et al.	R60/12872, etc.	American selling price	As set forth in column titled "claimed value per pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/128	Richardson, J. May 15, 1978	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R64/20455, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Elastic Fabric", "Cotton Tissue", etc.
R78/129	Watson, J. May 15, 1978	Given International, Inc.	R70/8296	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Houston Lathes
R78/130	Richardson, J. May 16, 1978	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R64/20833, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Elastic Fabric", "Cotton Elastic Weavings", etc.
R78/131	Richardson, J. May 16, 1978	H. W. Robinson Air Freight Corp., a/c Jaymar Ruby, Inc.	R64/21611, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Elastic Fabric"
R78/132	Richardson, J. May 17, 1978	Jaymar Ruby, Inc.	R65/23579	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Elastic Fabric"

R78/133	Richardson, J. May 17, 1978	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R66/1574, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Elastic Webbings", "Nembrace New Belt", etc.
R78/134	Richardson, J. May 17, 1978	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R66/2556, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Cotton Elastic Web", etc.
R78/135	Richardson, J. May 18, 1978	Jaymar-Ruby, Inc.	R66/467, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Elastic Fabric", "Cotton Elastic Web", etc.
R78/136	Richardson, J. May 18, 1978	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R66/7347, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Cotton Elastic Web", "Cotton Elastic Webbing", etc.
R78/137	Richardson, J. May 19, 1978	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R64/20525, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Elastic Fabric"
R78/138	Watson, J. May 19, 1978	Given International, Inc.	R68/14540, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	San Francisco Lathes
R78/139	Watson, J. May 19, 1978	Given International, Inc.	R70/9626	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Seattle Lathes
R78/140	Watson, J. May 19, 1978	Lasco Rubber Company	R62/4524	American selling price	As set forth under column titled "Claimed Value per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/141	Ford, J. May 24, 1978	C. J. Tower & Sons of Buffalo, Inc., et al.	R69/293	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; also included in the decision and judgment is the value of optional equipment of each Studebaker automobile	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Niagara Falls (Buffalo) Studebaker automobiles and optional equipment
R78/142	Watson, J. June 15, 1978	Ciba-Geigy Corporation and Ciba-Geigy Corporation - REN Plastics	76-1-00219	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% for merchandise exported in 1969 and 29.2% for merchandise exported in 1970, representing profit and general expenses usually made in sales in U.S. of dyestuffs of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs

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